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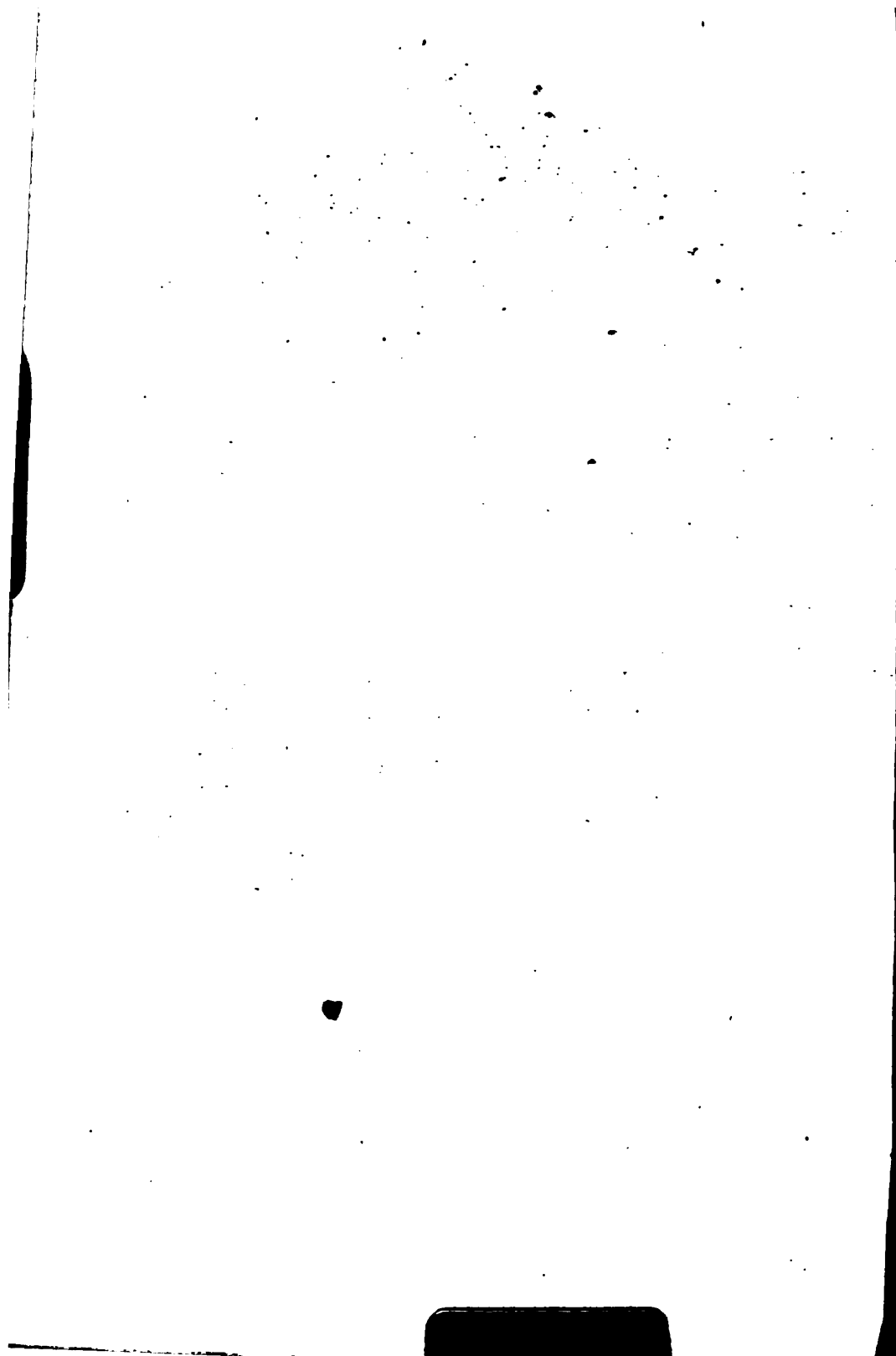
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v.6





CASES

DECIDED IN

House of Lords

THE HOUSE OF LORDS,

ON APPEAL

FROM THE COURTS OF SCOTLAND.

1832. 1833.

REPORTED BY

JAMES WILSON AND PATRICK SHAW, ESQUIRES,
ADVOCATES,

AND

C. H. MACLEAN AND W. R. COURTENAY, ESQUIRES,
BARRISTERS AT LAW.

VOLUME VI.

EDINBURGH:

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AND

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NOTE TO VOL. VI. PART II.

As enquiries have been made relative to the order in which these Reports stand, it may be proper to give the following explanation :— They were commenced by Mr. SHAW, who published, in Two Volumes, the decisions pronounced the Years 1821, 1822, 1823, and 1824. These Reports are known by the Title of SHAW's Reports of Appeal Cases. They were continued under the Name of WILSON and SHAW's Reports from 1825 by Mr. WILSON and Mr. SHAW, and it was at one time intended that their Reports should conclude with the Cases decided in 1831, and that in future the Reports should be conducted by Mr. WILSON and Mr. COURTENAY, under the title of WILSON and COURTENAY. These Gentlemen published the decisions in 1832, as a First Part of Volume First of a new series, and meant to have reported those of 1833 and 1834. But in consequence of the promotion of Mr. WILSON to the office of

First President of the Court of Appeal in the MAURITIUS, and of the retirement of Mr. COURTENAY (now Lord Courtenay) from the Bar, the duty of preparing the Reports of these decisions has devolved on Mr. SHAW and Mr. MACLEAN.

In order to preserve the series unbroken, the Reports of the years 1832, 1833, and 1834 are included in the Volumes entitled Vols. VI. and VII. of WILSON and SHAW : and the proposed series of WILSON and COURTENAY has been laid aside. The Reports therefore of 1832, published by Mr. WILSON and Mr. COURTENAY, should be bound up with those contained in this Part (containing some of the Cases decided in 1833) as Vol. VI. of WILSON and SHAW ; and the remaining Cases of 1833 and those of 1834 (to be published in a separate volume) will form Vol. VII. of that Collection.

Another Collection had in the mean time been begun by Mr. SHAW and Mr. MACLEAN in 1835, which has been continued till 1838, and consists hitherto of Two Volumes and part of a Third Volume.

1st October 1838.

CASES
DECIDED IN THE HOUSE OF LORDS,
ON APPEAL FROM THE
COURTS OF SCOTLAND,
1832.

[6th *March* 1832.]

JAMES ROBERTSON, Appellant. — *Campbell.*
HARFORD, BROTHERS, and COMPANY, Respondents.—
Archbold.

No. 1.

Sale—Acquiescence. In defence to an action by a seller, raised in the Burgh Court of Glasgow, for payment of a balance of an account for iron purchased from him, the purchaser pleaded, 1st, that the iron was not sent within the time ordered; 2dly, that it was deficient in weight; 3dly, that it was of different sizes from those specified in the order. The seller maintained that he had fulfilled the terms of the bargain, and that the purchaser was at any rate barred by his silence and acquiescence. The Burgh Court sustained the defences; but the Court of Session, on advocacy by the pursuer, adhered to the Lord Ordinary's judgment, altering and decerning in terms of the libel, and found the advocator entitled to expences in the inferior court and in the Court of Session. The House of Lords reversed the judgment of the Court of Session, and found the defender properly assoilzied by the Burgh Court, and remitted to the Court of Session to proceed as might be necessary to give effect to this judgment.

No. 1.
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 1832.
 —
 ROBERTSON
 v.
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 and others.

Expences.—The Court of Session having, in the advocacy, found the advocator entitled to the expences of the whole suit, including those incurred in the original action as well as in the advocacy, the House of Lords altered, and found the appellant (the original defender) entitled to all the expences in the advocacy, up to the date of and including the Lord Ordinary's judgment; but that the appellant and respondent ought respectively to bear their own expences in the advocacy in the Inner House, and of the appeal.

2d Division.
 —
 Ld. Fullerton.

ON the 7th February 1827, James Robertson, iron-monger in Glasgow, wrote to Harford, Brothers, and Company, iron-masters in Bristol, as follows:—"Sub-
 " joined is a specification for seventy-three tons and
 " sixty bars iron, which please order to be shipped
 " in the course of two or three weeks at most, of a
 " good quality, and charged at or under the prices I
 " have within these few weeks been quoted by two
 " different Welsh houses, viz.: — bars at 8*l.* 10*s.* and
 " rods at 9*l.* 10*s.* I intend to pay you with a banker's
 " draft at par, from the date of the iron arriving
 " here, and will expect the discount I am quoted
 " for prompt payment, viz. five per cent. Please give
 " instructions the rods are all sent the exact sizes
 " ordered. I hope you will be able to get a vessel to
 " bring the iron for about 12*s.* per ton, as the days are
 " now getting longer, and the weather better. Please
 " write me as early as convenient when I may expect
 " the present order shipped, being out of all the sizes
 " of rods and part of the bars. If you cannot ship
 " my order immediately, I will require to send it to
 " another house. Expecting to hear from you in a few
 " posts," &c.

On the 10th February, Harford, Brothers, and Company answered,—“We have duly received your favour
“ of the 7th, annexing order for bar iron and rods,
“ which you offer us at the price of 8*l.* 10*s.* for the
“ former, and 9*l.* 10*s.* for the latter, delivered at
“ Newport, less discount five per cent. for banker’s
“ draft at par, from the arrival of the iron with you.
“ On these terms we must decline the order, but shall
“ be happy to execute it at the prices quoted, allowing
“ you five per cent. for banker’s draft at par, to be
“ remitted us on receipt of invoice. We wait your
“ reply, and remain, &c.”

On the 12th February, Robertson replied,—“In
“ reply to yours of the 10th instant, I will take the
“ iron at the prices and discount mentioned, viz. bars
“ at 8*l.* 10*s.* and rods at 9*l.* 10*s.*, five per cent. off for
“ a banker’s draft at par, from receipt of invoice, which
“ I engage to send you, provided you send it off before
“ any general reduction, and warrant the iron all the
“ sizes ordered. Please ship the annexed jobbing iron
“ along with the last order.

“ When your Mr. Davies was lately here, I men-
“ tioned to him I intended to visit the works before I
“ bought much iron. I find I require what I have
“ ordered from you in the meantime, to assort my
“ stock. My reasons for intending visiting the dif-
“ ferent works in Wales is, to endeavour to buy iron
“ as cheap as the Liverpool iron dealers, for they come
“ here and sell iron delivered in Glasgow to consumers,
“ &c. as cheap as it can be brought from Wales at the
“ common list prices. I am certain that they buy iron
“ at least 10*s.* per ton lower than the regular list prices.
“ In case you agree to supply me at 10*s.* per ton under

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“ the regular list prices, I would send all my orders for
 “ Welsh iron to your house, and would engage to take
 “ at the rate of 400 to 600 tons per annum, provided
 “ the qualities were equal to any of your neighbours.
 “ You may let me know regarding this so soon as
 “ convenient. I hope you will allow me at least
 “ Mr. Cowan’s commission of the present order when
 “ it is sent to you direct; however, I will leave this to
 “ yourselves for the present order only, and in case you
 “ do not give any extra allowance, same as I know the
 “ Liverpool merchants get, I must apply to another
 “ house for the next supply of iron I require; it is
 “ probable, however, before then, I will be at most of
 “ the works in Wales. Whatever you and I agree for,
 “ I engage it will be for prompt payment, and the
 “ terms will not be mentioned by me. Messrs. W. D.
 “ and W. E. Acraman wrote on the 17th instant,
 “ saying they could get iron shipped for Glasgow at
 “ 12s. or from Bristol at 10s. per ton; but as I had
 “ sent you an order before receiving their advice about
 “ freight, I have not sent them an order, although they
 “ have quoted me bars 8 $\frac{1}{2}$ 10s., and other kinds in pro-
 “ portion. I hope you will be able to find out the
 “ vessel that they could have shipped iron on board of
 “ for me, and ship my order to you all on board of it.
 “ If you had the iron at Bristol to answer my specifica-
 “ tions, it would be a saving to me to get it all shipped
 “ there. I have no objections you ship what part of it
 “ you have at Bristol, and the remainder at Newport.
 “ Please advise me as early as convenient (which I hope
 “ will be in a few posts) when I may expect the iron
 “ all shipped ordered from you; for if you do not ship
 “ it in the course of ten or fourteen days at most, I will

“ require to order some from Liverpool. Waiting
 “ your reply, I remain, &c.”

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 ROBERTSON
 v.
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 and others.

Robertson again wrote on the 8th March, — “ Since
 “ I handed you an order, 7th ultimo, for iron, I am
 “ offered bars at 8*l.*, and nail-rod iron at 9*l.*, six
 “ months, or three per cent. off for prompt payment.
 “ As I expect you will supply me at such prices, as I
 “ will have iron as low from you for prompt payment
 “ as from the house above alluded to (which I am not
 “ at liberty at present to name), I herewith hand you a
 “ small addition to my last order, and request you will
 “ ship the whole at two or three weeks at most. In
 “ case any reduction takes place at quarter-day next
 “ month, the house alluded to agrees to give me the
 “ advantage of it, as an inducement to hand them an
 “ order; but this I do not at present intend to do,
 “ provided you supply me on as reasonable terms as I
 “ have been quoted. In these very unpropitious times,
 “ people run enough of risk in selling their goods on
 “ credit, without losing on the stock in hand.

“ It would be very discouraging for me to have iron
 “ shipped by you so near quarter-day, and the invoice
 “ price reduced between the time shipped, and the
 “ time of its arrival here. No doubt Messrs. W. D.
 “ and W. E. Acraman, Bristol, must buy iron as low
 “ or lower than I have been quoted within these few
 “ days, otherwise they could not have afforded it to me
 “ at the prices they have recently done, viz. bars at
 “ 8*l.* 10*s.*, and rods, 9*l.* 10*s.*, six months, or five per
 “ cent off for prompt payment.

“ Please acknowledge receipt of this in course, and
 “ say when you have prospects of shipping all the iron
 “ I have ordered. In case you guarantee no reduction

No. 1. " at quarter-day (next month), I could wish it shipped
 6th March " immediately. If you are not inclined to do this, I
 1832. " wish none of it now shipped till after the result of
 ROBERTSON " the first quarterly meeting. Waiting your reply, I
 v. " remain, &c."
 HARFORD
 and others.

Harford, Brothers, and Company replied, by letter without date, but having the Glasgow post-mark, 15th March, — " We have duly received your favour of 8th instant, and note the price at which you have been offered iron. We do not accept orders on these terms. Previous to receipt of your favour, a vessel (the *Pembroke*) was engaged to take your iron at 12*s.* per ton. Our agent at Newport writes us under date of the 13th instant, — ' The *Pembroke* is engaged for Glasgow at 12*s.* per ton, and is this morning only come into berth.' "

Robertson replied, on the 16th March,—" Yours of the 13th instant is in my possession. In reply, as you did not ship the iron in two or three weeks after ordered, I was obliged to buy as much otherwise as serve my customers for six or eight weeks to come. Therefore, I trust you will guarantee no general reduction in price next month in Wales. You will, I hope, be as liberal as another house that offers me iron at 10*s.* per ton under the prices you last quoted, guaranteeing that in case a reduction takes place in Wales next month I will have the benefit of it. Provided you agree to this, I will remit you a banker's draft on receiving invoice and bill of lading. If any reduction takes place, I will not ask the money from you, but take iron for the difference. Because you have not shipped my order in the time I mentioned when I sent it (viz. in two or three weeks at

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No. 1.
—
6th March
1892.
—
ROBERTSON
v.
HARFORD
and others.

" Amount	-	-	-	£709	14	7
" From which deduct five per cent.	35	9	7			

“ for which be pleased to hand us banker’s draft, in
“ course of post, agreeably to letter of 12th ultimo,
“ extract from which we hand you above. We think
“ you must admit that we cannot, with propriety, be
“ called upon to make the abatement required, when
“ we assure you that we would not now take an order
“ on the terms you quote. With regard to the time of
“ shipping the order, we cannot command vessels at the

No.1. " moment they may be wanted, particularly when
 6th March " limited as to freight."
 1892. Robertson, in answer, wrote on the 27th March,—
 ROBERTSON " You have herewith enclosed two drafts on London,
 v. " viz. one for 200*l.* at sixty days from 1st ultimo, and
 HARFORD " another for 435*l.* 18*s.* 4*d.* at thirty-five days from this
 and others. " date — amount of both, 635*l.* 18*s.* 4*d.*, which, with
 " 10*s.* per ton off your invoice, and five per cent. off
 " the gross amount, is the amount of same. This is a
 " mistake, for the five per cent. should have been off the
 " net amount, after the 10*s.* per ton was taken off, but
 " this I did not observe till the banks were shut to-day.
 " However, when you agree to let me have the iron at
 " the prices I have been offered, ' viz. bars at 8*l.* and
 " rods at 9*l.*, five per cent. off for bankers' drafts,' I
 " will immediately thereafter remit you the 1*l.* 18*s.* 3*d.*
 " of difference, overlooked this forenoon. If you had
 " shipped the iron in two or three weeks at most after
 " ordered, I would not have expected it under the
 " prices iron was generally selling at, at the date
 " ordered, for the reasons mentioned in my letters to
 " you of the 8th and 16th current. I trust you will
 " not hesitate to allow me the 10*s.* per ton off your
 " invoice prices, and in case you act liberally to me, I
 " will get my father-in-law, Mr. James Henderson,
 " Stirling, soon to send you an order for iron, and will
 " engage to take 100 tons from you, first I require, if
 " you supply as cheap for prompt payment as I can
 " buy otherways."

In reply, Harford, Brothers, and Company wrote, on the 31st March,—“ We duly received your favour of
 “ 27th, enclosing bills, value 635*l.* 18*s.* 4*d.* to your

“ credit, and leaving a balance of 38*l.* 6*s.* 8*d.* due to
 “ us, which we beg may be remitted to us in course of
 “ post. You never made the shipment of your order
 “ in two or three weeks the condition on which you
 “ gave it, nor did we ever engage to execute it in that
 “ time; on the other hand, you confirmed your offer,
 “ under date of 12th February, on the terms quoted in
 “ our letter of the 10th same month, provided it was
 “ shipped before any general reduction. The terms
 “ of our agreement being so perfectly plain, and the
 “ conditions of it being fulfilled on our part, we cannot
 “ think of any abatement, and beg the balance may be
 “ immediately remitted. We confirm what we stated
 “ in our last, that now we should decline an order on
 “ terms lower than there charged.”

And on the 30th April, Harford, Brothers, and
 Company wrote, — “ Annexed we have the pleasure of
 “ handing you our prices of bars. We are surprised
 “ we have not received a remittance for balance due on
 “ our last transaction, 38*l.* 6*s.* 8*d.* If it is your intention
 “ to resist the payment of it, be good enough to inform
 “ us, as we cannot abandon the claim.”

In answer, Robertson wrote to Harford, Brothers, and
 Company, on the 4th May, — “ Your letter of the
 “ 31st March and 30th ultimo is in my possession. In
 “ reply, you know I ordered, on the 7th February,
 “ seventy-three tons and sixty bars iron, to be shipped
 “ in two or three weeks at most from that date, and it
 “ was not shipped till the 21st March, being six weeks
 “ from the date ordered. On the 10th February you
 “ advised me it would be shipped, without craving
 “ longer time than mentioned in my order. In con-
 “ sequence of you not shipping it within the time I

No.1.

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1832.ROBERTSON
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“ wanted it, I was obliged to get a supply of iron from
“ Liverpool, and therefore, on the 8th March, wrote
“ you not to send off the iron till it was known what
“ were to be the prices fixed in Wales for April, my
“ customers having in the interim got a supply of iron
“ otherwise. You wrote me on the 13th March (not in
“ course of post), saying you had engaged a vessel to
“ take the iron, after it was believed iron would generally
“ be 10s. or 20s. per ton lower in Wales in April.
“ After you think of the foregoing circumstances, I
“ trust you will not hesitate to allow the deduction
“ claimed; however, in case you are not inclined to do
“ this, I have no objections to refer the difference to two
“ respectable people here in the iron trade, you to
“ choose one, and me the other. Expecting you will
“ act liberally in this case (for the reasons now and
“ formerly wrote you), I herewith hand you an addition
“ of fifty-three tons and fifty bolts iron to my order of
“ the 8th March, all of which I hope you will be able
“ to ship in the course of two or three weeks at most,
“ exact the sizes ordered. Please see the qualities are
“ good, and the nail-rods weight. You will observe
“ from the annexed statement of my warehousemen,
“ that the last was not weight. Your weights have got
“ light with using. When you now are informed of
“ this, it is expected you will get them adjusted. It was
“ a mistake in me saying, in my letter of the
“ 27th March, the balance due you was 1*l.* 18*s.* 3*d.* after
“ deducting 10*s.* per ton, and five per cent. off the iron
“ invoiced 21st March, as it is only 10*s.* 2*d.* The short
“ weight on rod iron comes to much more than 10*s.* 2*d.*
“ On receiving invoice and bill of lading of the iron
“ ordered 8th March and to-day I will remit you a

“ banker’s draft, deducting five per cent. Please agree
 “ the freight at lowest rates. Expecting invoice and
 “ bill of lading in the course of two or three weeks, I
 “ remain, &c.”

No. 1.
 —
 6th March
 1832.

ROBERTSON
 v.
 HARFORD
 and others.

“ We, the subscribers, have examined all the rod-iron,
 “ &c. invoiced by Messrs. Harford, Brothers, and
 “ Company, 21st March last, and find none of the
 “ nail-rods smaller than No. 7, by thirteen wire-gage,
 “ although there is five tons invoiced No. 8. by four-
 “ teen. On account of the smallest size not being sent,
 “ it renders most of the sizes sent unsaleable till the
 “ smallest size is got to sell along with them, as the
 “ consumers will not generally buy the thickest sizes
 “ sent without a proportion of the smallest size (No. 8.
 “ by fourteen wire-gage) along with them at the same
 “ price. We have farther to mention, not one bundle
 “ of the nail-rods in forty will stand the weight (60lb.)
 “ An allowance will have to be made for the short
 “ weight when sold. — (Signed) *John Craw, Robt.*
 “ *Gardner.*”

And the same warehousemen afterwards reported, —
 “ We, the subscribers, have examined the nail-rod iron
 “ invoiced by Harford, Brothers, and Company,
 “ 21st March last, and find, on an average, each of the
 “ 1,220 bundles nail-rods, one and one-half pound
 “ short of sixty pounds, some of them more, and some
 “ of them a few ounces less.”

The deficiency in weight of nail-rod iron was stated
 at 15 cwt. 1 qr., which at 9s. 6d. amounted to
 7l. 4s. 10d.

Harford, Brothers, and Company raised an action,
 before the Bailies of the burgh of Glasgow, against

No. 1. Robertson, for payment of the balance of 38*l.* 6*s.* 8*d.* :—
 6th March 1832. The defender stated in defence the substance of the foregoing correspondence, and maintained that up to the 8th of March there had been no concluded contract ; that he had distinctly stated the prices and conditions on which he would purchase ; that by the failure of the pursuers to forward the iron at the terms and within the time stipulated, they forced him to supply himself, on disadvantageous terms, elsewhere, whereby he sustained damages, by the interruption of his trade and actual loss of profit, to an extent equal to at least 10*s.* per ton, being 38*l.* 6*s.* 8*d.*, besides the loss which he suffered from the deficiency in weight and size of the iron sent.

Nov. 20, 1829. After various steps of procedure the Bailies found,
 “ That the terms of the original purchase, and sale of the
 “ quantities of iron in question, were fixed by the de-
 “ fender’s letters of the 7th and 12th February 1827 and
 “ the pursuers’ letter of the 10th February 1827 : Finds,
 “ that from their failure to object, and tacit acquiescence,
 “ the pursuers must be presumed to have consented to
 “ the limitation, with regard to the time of shipment, ex-
 “ pressed in the said letters, viz. immediately, or in
 “ the course of two or three weeks at most from the
 “ date of the pursuers’ first letter, or before any ge-
 “ neral reduction of price, and in the course of ten or
 “ fourteen days at most from the date of the defender’s
 “ said second letter : Finds it not proved that the pur-
 “ suers gave the defender any intimation of their not
 “ being able to furnish the quantities and descriptions
 “ of iron ordered by him until they were manufactured :
 “ And finds the delay on the part of the pursuers, in not
 “ completing the shipment of the said iron till the 19th

“ and 20th March 1827, relevant to liberate the de-
 “ fender from his obligation to pay for the said iron at
 “ the stipulated price : Finds, that by his letter of the
 “ 8th March 1827 the defender, of new, bound himself
 “ still to take the iron formerly ordered by him, if
 “ shipped immediately or in the course of two or three
 “ weeks at most, in case the pursuers guaranteed no
 “ reduction at quarter-day next month, but that other-
 “ wise he wished none of the iron now shipped : Finds,
 “ that, having liberated the defender from the terms of
 “ the original bargain by their delay in shipping the
 “ said iron, the pursuers, by making the shipment after
 “ receipt of the defender’s said letter of the 8th March
 “ 1827, tacitly acquiesced in the terms of the new
 “ bargain in point of price therein proposed, and sub-
 “ sequently confirmed that bargain by transmitting the
 “ bill of lading, and by retaining and using the remit-
 “ tances made by the defender upon the footing thereof :
 “ Finds, that, agreeable to this new bargain, the defender
 “ has received, retained, and disposed of the iron so
 “ shipped by the pursuers, and the pursuers have re-
 “ ceived payment of the price remitted by the defender :
 “ Finds, that, in these circumstances, it is unnecessary
 “ to inquire, in this process, whether the defender’s
 “ counter claim of damages from alleged deficiency in
 “ the quantity of iron shipped or otherwise be well
 “ founded or not ; assoilzies the defender, and decerns,
 “ reserving to the defender any claim of damages com-
 “ petent to him, and to the pursuers their defence
 “ against the same : Finds the defender entitled to
 “ expenses of process, and remits to the auditor to
 “ tax the same, dispensing with petitions.”

No.1.

 6th March
 1832.

 ROBERTSON

 v.
 HARBORD
 and others.

- No. 1. The pursuers brought this interlocutor, by advocacy,
 6th March under the consideration of the Court of Session, and
 1832. the record having been there closed, the Lord Ordinary
 ROBERTSON found, " That, by the correspondence terminating in
 " the respondent's letter of the 12th February 1827,
 " the respondent ordered from the advocators a
 10th July 1830. " quantity of iron, mentioned in that letter: Finds,
 " that although the respondent subsequently com-
 " plained of the delay of executing the order, and
 " did, in his letters of the 8th, 16th, and 27th March
 " 1827, found upon that circumstance a demand
 " of some abatement of price, such demand was
 " not complied with on the part of the advo-
 " cators: Finds, that the advocators, in their letter
 " of the 24th March 1827, inclosing the invoice of
 " the iron, and in their letter of 31st March 1827,
 " explicitly intimated to the respondent that no
 " abatement was to be allowed, and that the iron was
 " sent in terms of and at the prices specified in the
 " respondent's letter of the 12th February: Finds,
 " therefore, that there was no new agreement between
 " the parties, altering the prices of the iron originally
 " fixed, and that the respondent was bound, either to
 " take the iron at those prices, or to reject it, if he
 " considered himself set free from the contract in con-
 " sequence of the alleged delay in its execution on the
 " part of the advocators: Finds, that he did not so
 " reject the iron; but, on the contrary, having, some
 " time before the arrival, received the advocators' letter
 " of 31st March, stating that it was sent at the prices
 " originally fixed, and no other, he took possession of
 " the iron, without making any answer, or stating any

“ objection to the contents of that letter, until the
 “ 4th of May, at which time a second demand had
 “ been made upon him by the advocators for payment
 “ according to the prices originally fixed: Finds, that
 “ in these circumstances the respondent, by his ac-
 “ ceptance of the iron, and his failure to answer the
 “ letter of the 31st March, must be held to have
 “ departed from any objections on the ground of the
 “ alleged delay on the part of the advocators in exe-
 “ cuting the contract, and to have accepted the iron on
 “ the terms on which it was sent by the advocators:
 “ Finds also, that the respondent’s objections, in regard
 “ to the alleged deficiency of weight of the iron fur-
 “ nished, were neither made at the time nor in the
 “ terms requisite to enable him to state them as a com-
 “ petent defence in the present action; and in respect
 “ of the reasons above set forth advocates the cause,
 “ alters the interlocutor complained of, and decerns in
 “ terms of the libel: Finds the advocators entitled to
 “ expences, allows an account thereof to be given in,
 “ and remits the same to the auditor to tax and
 “ report.”

“ *Note.* — The Lord Ordinary has not found it ne-
 “ cessary to determine the question, whether or not,
 “ according to the terms of the original contract, there
 “ was any undue delay in its execution by the advo-
 “ cators. That circumstance, though it might warrant
 “ the rejection of the iron by the respondent, evidently
 “ did not authorize him to take it at a lower price.
 “ The question merely at issue, then, between the
 “ parties, is, whether, at the time when the iron was
 “ sent by the advocators, and received by the respon-
 “ dent, the terms of the original contract had, in that

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“ particular, been altered. If, therefore, the Lord
“ Ordinary had been satisfied, as the magistrates were,
“ that the pursuers, by making the shipment after
“ receipt of the defender’s said letter of 8th March
“ 1827, tacitly acquiesced in the terms of the new
“ bargain in point of price therein proposed, and sub-
“ sequently confirmed that bargain by transmitting the
“ bill of lading, and by retaining and using the re-
“ mittances made by the defender upon the footing
“ thereof, he must have concurred in the judgment.
“ But it appears to him, that finding is directly at
“ variance with the facts of the case. The advocates,
“ so far from acquiescing in the proposal in the letter
“ of 8th March 1827, and confirming it, by trans-
“ mitting the bill of lading, &c., expressly and re-
“ peatedly rejected that proposal. 1st, in their letter
“ of 13th March; 2d, in their letter of 24th, 1827,
“ inclosing the invoice, and demanding a remittance in
“ terms of their letter of 12th February; and, lastly,
“ when the respondent, in answer to the letter of the
“ 24th, inclosed a remittance to a certain amount, and
“ claimed a deduction from the price originally fixed,
“ in terms rather resembling the request of a favour
“ than the assertion of a right, he was definitively in-
“ formed in the letter of the 31st March that no abate-
“ ment of the price would be allowed. It is clearly
“ proved that there was no new bargain in regard to
“ price. The advocates made the shipment exclu-
“ sively on the terms of the original bargain, and
“ intimated that they accepted the remittances merely
“ as a partial payment; and therefore, although the
“ respondent might have rejected the iron if he con-
“ sidered himself set free by the delay of the shipment,

“ or might even have held it in security of the remittances he had previously made, he clearly could not do so without giving due notice; and having taken possession of the iron without giving such notice, and having left unanswered the advocates’ letter of 31st March for five weeks, he must be held, according to the ordinary rules, to have accepted it on the terms mentioned in that letter. The objection of the deficiency of weight stands pretty nearly, though not quite, in the same situation. The iron arrived in Glasgow about the middle of April, and the witnesses, called by the respondents to prove the deficiency of weight, establish, that it was weighed within three or four days after its arrival; but no objection on that score was communicated to the advocates until the 4th May, when the respondent was disputing his liability for the price as originally fixed; and even in that letter the circumstance is not stated in terms sufficient to apprise the advocates that it was seriously intended to be made the ground of a specific claim of deduction.”

Against this judgment both parties reclaimed to the Inner House, the defender on the merits of the cause, and the pursuers on certain points of expences, when their Lordships adhered “ to the interlocutor submitted Jan. 29, 1831. to review on the merits: Find expences of this note, discussion in the inferior Court as well as in the Outer House due; remit to the Lord Ordinary to ascertain the amount, and proceed as to him shall seem fit, and decern.” And of same date, found “ the advocates (pursuers) entitled to their expences Jan. 29, 1831. in the inferior Court, and in so far alter the interlocutor submitted to review; remit to the Lord

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No. 1. " Ordinary to ascertain the amount, and proceed as
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 1832. Against these judgments the defender appealed.

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Appellant.—As the respondents, before completing the shipping of the iron, were in possession of the appellant's letters of the 8th and 16th March, distinctly informing them that he would become a purchaser only if they sold to him at the rate of 8*l.* and 9*l.* per ton, and as, when, notwithstanding these letters, they dispatched an invoice of that iron at the higher rate of 8*l.* 10*s.* and 9*l.* 10*s.* per ton, the appellant adhered to his former terms, by remitting to them, not the amount of the higher rate which they demanded, but of the lower rate which he had offered, they have no title to demand the higher rate, unless they can show that he was already bound to pay it by some previous existing contract, or agreed to pay it by some subsequent engagement, express or implied.

If there was such a previous binding contract, it must be sought only in the letters of 7th, 10th, and 12th February. But it is a general rule, that where there is a proposal as to matters of contract, the party making the proposal has a right to withdraw his offer, or to vary the terms, any time between the making of the proposal and the absolute unqualified acceptance of it by the other party. Now, the respondents, instead of accepting by their letter of the 10th the appellant's original offer of the 7th, expressly declined it, and stated new terms of their own. The appellant's letter of the 12th, again, was not an acceptance of the re-

* 9 Shaw and Dunlop, 352.

spondents' offer of the 10th, but stated new terms on his part for their acceptance or rejection. These terms had not been accepted by the respondents in any shape when the appellant wrote his letter of the 8th March, varying his proposal, and offering only a lower price, to which terms he adhered to the end. There was therefore no concluded contract contained in the previous letters.

The same consequence would have followed even if the letter of the 8th March had not been written, because the original proposals had ceased to be binding by the long silence of the respondents concerning them. On the 8th of March the respondents could not have compelled the appellant to receive the iron: by that time all former proposals were at an end, and his letter of that date was the commencement of a new series of negotiations, by which alone his obligations are to be ascertained; and the result is the same, whether the original letters did or did not constitute in themselves a concluded bargain, as he was freed by the respondents' culpable delay in shipping the iron.

The appellant being thus entitled to make the new proposals contained in his letter of 8th March, it was no longer in the power of the respondents to insist upon the terms of the 12th February; and their letter of the 15th March being merely a rejection of the new terms of the 8th of March, the matter remained open on both sides. Then came the appellant's letter of 16th March, presenting to the respondents a distinct proposal. This proposal it was incumbent on the respondents to accept or reject. The iron was still under their control, as no part of it had been shipped when they received the letter of 8th March, and the shipping

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had not been finished when they received that of the 16th. If, notwithstanding, they allowed the vessel to sail with the iron, they could not, by their own act, alter the relative situation of the parties, or create new obligations against the appellant.

After the iron had been thus dispatched the appellant did no act imputing acquiescence in the terms on which the respondents pretended to have shipped it. His first information was derived from the invoice, and he immediately rejected it by his letter of 27th March, and by remitting the amount of the iron at the lower price which he had tendered. Neither was his receiving and retaining the iron an act of acquiescence. As the respondents, instead of returning his drafts, had retained them, and afterwards completed the delivery of the goods by transmitting the bill of lading, they thereby accepted his terms; and at all events the relation into which the parties were brought was merely this, that the respondents, by qualifying that retention of the drafts by their letter of 31st March, reserved to themselves the right of still insisting for the balance, as under a former contract, if they could establish that contract, a right which, without such a qualification, they would have lost. The utmost effect of that letter, coupled with the retention of the money, is, that they were to be bound to acquiesce in the terms of the appellant, and not attempt to void the sale, if they failed in making out the other contract, in which they have failed.

At all events, the appellant was entitled to deduction on account of the deficiency in quantity. He stated this deficiency timeously; but, even if he had not, the principle, that a purchaser must notice defects immediately, applies only where he makes these defects a ground

for voiding the sale. Where he pleads it only to the effect of not paying for more than he receives, the respondents must perform their part of the contract. They were bound to deliver all the iron for which the appellant was bound to pay; till they have done so they have not fulfilled their contract; and that they were not called on to fulfil it completely till a fortnight after they might have been called on to do so, is no reason that they should not be called on to do it at all.

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Respondents.—The early correspondence between the parties constituted a concluded contract of sale with the appellant; and of this contract the respondents duly fulfilled all the conditions.

The appellant was not entitled to resile from his contract, completed by his letter of 12th February 1827, so long as no general reduction took place in the price of iron. As to shipping, there was no delay of which the appellant has any reasonable cause of complaint.

Although the respondents had not duly fulfilled the conditions of the contract, closed by the letter of 12th February, the appellant is barred from objecting to pay the invoice-price, in respect of his taciturnity and acquiescence, and of his taking possession and disposing of the iron. The objection as to want of quantity is manifestly untenable. The objection, if any did exist, which is denied, should have been made tempestive.—Whitsun and Trustees, 22 Feb. 1828, (6 S. & D. 579); 1 Bell, 440; 3 Ersk. 3, 10; 1 Bell, 439; Rennoch, 27 Jan. 1820, (F. C.); Jaffrey, 7 Dec. 1824, (3 S. & D. 375); Cossar, 8 June 1826, (4 S. & D. 685); Sharratt, 15 Feb. 1827, (5 S. & D. 361); Watt, 6 Feb. 1829,

- No. 1. (7 S. & D. 372); Rowe, 1 Starkie, 140; Groning;
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 Ralston, 16 June 1761, (Mor. 14,238); Baird, 14 Dec.
 ROBERTSON 1765, (Mor. 14,240); Baird, 13 Feb. 1788, (Mor.
 v. 14,243); Stevenson, 28 June 1808, (Mor. voce Sale,
 HANFORD No. 5. App.); Hall and Co., 3 June 1823, (2 S. & D.
 and others. 358); Fisher, 1 Camp. 193; Hopkins, 1 Starkie, 477.

LORD CHANCELLOR:— My Lords, when I entertain no doubt, it is my usual practice to advise your Lordships, at the close of the argument, either to affirm, to reverse, or to vary the decree of the Court below; for it is expedient to do it while the circumstances are recent in the recollection, and whilst counsel are at the bar, so that any slip in matter of fact or of practice may at once be set right. I shall have rather more occasion than usual, in the present case, to request the assistance of the learned counsel; for the course which I am disposed to recommend to your Lordships, in the reversal of the decision in the Court below, will set up the decision of the Bailies, though I do not think that decision (in the result of which I concur) can in all its parts stand, any more than the decision of the Court. Now, my Lords, in the first place, it is quite clear this decision cannot stand. The Court of Session, which reversed the decision of the Bailies Court upon advocacy, have per incuriam, and per incuriam only, given the advocator (that is the respondent) the costs, not of the Bailies Court, which they had a right to do, for they put themselves as a court of appeal in the place of the Bailies Court, but they give him also the costs of the advocacy; that is to say, they have punished the appellant for having the judgment of the Bailies, and visit him with costs,

for doing no more than every party is entitled if not bound to do, at all events, namely, supporting the judgment of which he was in possession. That part cannot stand; for though it would not have been of itself a ground of appeal, being only matter of costs, yet, even if the judgment had been affirmed in all its other parts, and if costs were incidental to the question, and there was nothing to show that it was brought colourably, being in reality an appeal for costs, this must have been altered. Now, my Lords, the question is, as we must alter it in one part, what are we to do with the rest of it? I cannot give the costs of this appeal to the appellant, for the reason which ought to have operated on the Court below, because the respondents are in possession of the judgment of the Court in Scotland. The bulk of the question is as to the costs of the advocacy, which I have disposed of, and the costs of the judgment of the Bailie Court, which will ultimately follow the event of the whole suit. These must be given to the party who originally had them, by the decision setting up and restoring the original judgment. Then comes the question which is not usually inferior in importance, — the question in the cause, which is the subject-matter of all this litigation. The costs in this case, as in many other cases, (though I never saw it more strongly exemplified than in this,) are of superior importance. Sometimes it is said in Westminster Hall, that causes of the least matter fill the Lord Chief Justice's paper; but here is a matter of 38*l.* 6*s.* 8*d.*, and the costs which have been already given will amount to a great deal more. The party whom I am about to let free from the charge of paying the demand of 38*l.* 6*s.* 8*d.*, it is true, gets rid of that, but he gets rid of it by coming

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here and paying 300*l.*, for aught I know, not one farthing of which I have the power of giving him; and the other party, who has his judgment for 38*l.* below, has no longer that 38*l.*, and he is saddled with his costs. If I had been to advise the party appealing, I should have said, Take care not to appeal, unless you find the costs below are over and above the 38*l.* 6*s.* 8*d.* so much as to make it worth while: and if I had been to counsel the other party, I should have given the same advice. I should have said, If Harford, Brothers, and Company have been so wrong-headed as to come to the House of Lords, do not you, Mr. Robertson, do so; let them have their way; do not come up here; for it is not very likely that the House of Lords will give you the costs of the appeal, where there was a judgment one way, by a learned judge in Glasgow, and another way by learned judges in Edinburgh. But upon the whole, though it has been an ill-advised proceeding, we must deal with it as well as we can, now it is here.

The question, my Lords, which has led to this expence and litigation is not a very complicated one in itself. It is, first, at what rate these gentlemen are to be allowed to charge, — whether at 8*l.* 10*s.* and 9*l.* 10*s.* or 8*l.* and 9*l.*; and this is the chief question, setting out of view that respecting the quantity. I have no doubt there is an error in the judgment of the Lord Ordinary, which finds that Robertson's objections, in regard to the alleged deficiency of weight of the iron furnished, were neither made at the time nor in the terms requisite (but we do not know what they are, and there is no form of taking objections), to enable him to state them as a competent defence in the present action. Is it no defence to the action, that there was a

shortcoming in the amount? If he has got ten, and is charged for twelve, whether it be bottles of wine or tons of iron, if he is called on to pay for twelve, and has actually paid for ten, is it not a complete defence to the whole action? and if he has got ten, and is called upon to pay for twelve, and he has paid only for nine, though it is not a defence to the whole action, is it not a defence to so many parts of it? So that I cannot understand the Lord Ordinary saying, that by taking the goods, and by not rejecting them, you waive all objection to the weight, and you treat them as one and indivisible, and as not capable of apportionment. You do not waive the objection to the shortcoming of the quantity, though that is apportioned; that objection may be taken, not at the time when you used the goods, but at the time you are called upon to pay for them. In the case put, if I buy a dozen of wine, and I only get ten, — if I drink the ten bottles, and am called upon to pay for twelve, it is absurd to say, in the language of this interlocutor, You must pay for twelve, — you ought to have taken the objection when the ten bottles came, and said, this is not a dozen, — here are only ten. That applies, if I had bought wine, expecting it of one vintage, and it turned out to be of another, and expecting it was good, though it turned out to be bad, even if it were as sour as vinegar, if I had taken the trouble to swallow it, I am bound to pay for it, and it is too late to take the objection: even keeping it would be sufficient, without drinking it. Nor do I in every point agree with the view taken by Mr. Reddie. There is not a more learned man at the Scotch bar, or upon any bench in any country, than Mr. Reddie. He is one of the most learned civilians, and, which might not be expected in one content to fill

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no higher place, one of the most learned general lawyers, and well acquainted also with the law of nations, he having once intended to devote himself to that study. I have known him all his life. I have known him in his scientific pursuits as well as his legal studies, and at the bar, of which he was one of the greatest ornaments during the years he remained there. I speak of his judgment then with all respect; but I am not satisfied with the findings of the Bailies under his direction. When a man shifts his ground of defence, it is always awkward, and more so before a jury. If a man sets up a falsehood before a jury, he is gone, in nine cases out of ten. But I have often thought that learned judges did not quite lean enough against the effect which counsel try to give to that shifting of the ground of defence,—it may be improper to be moving and shifting, yet the party may have a good case at the bottom, after all. I cannot help thinking that there was not sufficient shifting in the letter of the 16th, as compared with that of the 8th, to lead to the presumption that there had been a contract. I should have said it was quite decisive against Robertson, if it had rested in parole; but when I have written documents to refer to, I must look to these letters, and I do not think that it is decisive to overcome the effect of those letters. Now, before the letter of the 8th of March, it is perfectly clear that there was not a binding contract. The letters of the 7th, 10th, and 12th of February, all taken together, are not sufficient to make a binding contract. From the expression, “Previous to the receipt of your favour, a vessel (the “Pembroke) was engaged to take your iron at 12s. “per ton,” it has been ingeniously argued, that there had been a contract; but I cannot help thinking, that the

fair construction of this letter of the 8th of March 1827 is, that there was no contract. If there had been a binding contract before that, which the Lord Ordinary always seems to assume, and that is what I chiefly complain of, I admit that letter, whether answered by Harford and Company or no, is insufficient. If you bind yourself, you cannot either enlarge your own stipulation, if complete, nor diminish your own obligation, if complete, by a subsequent letter or a subsequent bargain, unless the other party choose to make himself a party to the charge, in which case there is a new bargain, the former being departed from. Robertson, in that letter, says, " Since I handed you an order of the 7th ultimo for " iron, I have been offered bars at 8*l*. and nail-rod iron " at 9*l*.—six months, or three per cent. off for prompt " payment." For the reasons I have given, I am of opinion he was then substantially free. Observe what he says: " As I expect you will supply me at such " prices—as I will have iron as low from you, for " prompt payment, as from the house above alluded to, " which I am not at liberty at present to name—I " herewith hand you a small addition to my last order, " and request you will ship the whole in the course of " two or three weeks at most. In case any reduction " take place at quarter day next month," &c. That looks like saying, I have ordered, but I have not got your answer; I do not know whether it is a concluded bargain; therefore, I now tell you, that it is with express condition of that bargain as to a fall, which had actually taken place. He says, " I expect you will supply me " at such prices;" for why should I pay more to you than to others? and upon that understanding I hand you another order, " and request you will ship the

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6th March I also incline to the opinion — not that I think it a clear
1832. case that this was a binding offer, or that it was meant
ROBERTSON to be accepted — but still, upon the whole, I am of
v. opinion that, sending the iron after that letter, it was too
HARFORD late for the sellers to say, we will go back to the first
and others. contract, because I think that there is no such contract.
They would have been quite right if they had said,
Remember, we send, not upon your letter of the 8th of
March,—we will not deal with you on that letter,—but
on the others. They would have been quite entitled to
say that; and there would have been no answer to it, if
they had had a contract whereon to place their foot, and
stand steady; but I am of opinion that there was not a
contract. No doubt that offer was, in words, rejected, but,
in acts and deeds, accepted by the party;—for they send
the goods, though they had no other contract antecedent
to the letter of the 8th of March, whereon they could
firmly rest the sale. In the letter of the 27th of March,
Robertson says, " I trust you will not hesitate to allow
" me 10s. per ton off your invoice prices; and in case
" you act liberally towards me I will get my father-in-
" law, Mr. James Henderson, of Stirling, soon to send
" you an order for iron." Now this, my Lords, a little
startled me at first, as well as the discrepancy between
the letters of the 16th and the 8th. It does look like a per-
son conscious that he had no legal right to have that 10s.
taken off; and if all rested on parole communication,
it would have been strong; but when I come to the
letters, I must construe them, and in fixing a con-
struction on them, guide my opinion as to what the
contract between the parties was. It often happens a
person has made a contract in writing which the law is

to construe. He is not aware of his equities under that writing; still the Court will give to him according to the sense and equity of that writing. At *Nisi Prius*, it often happens that they try to prove that a conversation took place between one party and another, after he had written something, and he, not being aware of the force of what he had written, or the rights which he had stipulated for, may have said something quite inconsistent with the legal effect of the writing; but the Court immediately say, that the question is, what right he has under it. This being the ground of my opinion, I think your Lordships cannot adhere to the decision of the Lord Ordinary. If I entertained a doubt on the question, as having an inclination rather than a very strongly-formed opinion, — if I thought this case had undergone a thorough discussion in the Court below, — if I found that the Lord Ordinary had applied his mind fruitfully to it, so as to produce an accurate judgment, — I should have been slow to reverse his judgment. I should not have thought it a case to advise judgment of reversal, having a leaning, as is fitting, rather to affirm than to reverse. But when I look to the judgment of the Lord Ordinary, it does not appear to me that he has fruitfully applied his mind to it, for he all along goes on the supposition that there was a completed agreement at first, and that the objection as to the deficiency of weight was neither made in time, nor in terms to raise a competent defence. The effect of the judgment I have to propose will be against the advocacy, and to set up the judgment of the Bailie Court in substance. I therefore now move your Lordships, that the interlocutor complained of be reversed, and that it be declared that the appellant was properly

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 6th March appellant must have the expences in the Burgh Court
 1832. and in the advocacy, until and including the judgment
 ROBERTSON of the Lord Ordinary; and the appellant and respondent
 " must bear their own expences on the advocacy in the
 HARFORD Inner House and of this appeal.
 and others.

The House of Lords ordered and adjudged, " That the
 " several interlocutors complained of in the said appeal be,
 " and the same are hereby reversed : And it is declared,
 " That the appellant was properly assoilzied by the interlo-
 " cutor of the Burgh Court, and was entitled to the expences
 " of process there : And it is further declared, That the said
 " appellant is entitled to have the expences of all proceed-
 " ings upon the advocacy up to and including the said
 " interlocutor of the Lord Ordinary dated the 10th of July
 " 1830; but that the appellant and respondent ought re-
 " spectively to bear their own expences of the proceedings
 " upon the said advocacy in the Inner House, and also
 " the expences of this appeal : And it is further ordered,
 " That the cause be remitted back to the Lords of Session
 " in Scotland, of the Second Division, to give such direc-
 " tions, and to proceed in the said matter as may be neces-
 " sary to give effect to this judgment."

MACQUEEN—EVANS, STEVENS, and FLOWER,—
 Solicitors.

[14th May 1832.]

MURDO MACKENZIE of Ardross, Esq., Appellant.—

No. 2.

Lushington—Knight.

HUGH ROSE of Glastullich, Esq., Respondent.—

Lord Advocate (Jeffrey)—Pemberton.

Salmon-fishing—Property.—A party, alleging his exclusive right of fishing salmon and all other fish in a river, to the banks of which he had no right, but to the waters of which, as well as to the fishings, he claimed an absolute and exclusive right, raised actions of declarator, suspension, and interdict against the proprietor of lands adjacent to and bounded by the river, and infest on titles, conveying the lands ‘cum pertinentibus,’ and supposed also ‘cum piscationibus,’ who claimed a right to fish for trout and other fish ex adverso his lands. The House of Lords affirmed the judgment of the Court of Session, holding that the latter proprietor did not require to prove prescriptive exercise of such right of fishing; but that, independent of such prescriptive possession, he had a right to fish trouts in the river ex adverso his property, with trout rods, but not with net and coble, or in any way prejudicial to the former party’s salmon-fishing.

MACKENZIE of Ardross, alleging that he stood heritably infest and seised in the whole salmon-fishings in the water, river, and linn of Shinn, together with the water and lynn itself, and whole parts, privileges, and pertinents thereof, and that he had accordingly occupied, possessed, and exercised the said whole fishings exclusively and uninterruptedly, raised an action of declarator against Rose of Glastullich, the proprietor of the lands

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of Achany, adjacent to the river Shinn, stating that Glastullich had, without any title or authority whatever, unwarrantably pretended and asserted a right to fish in that river ex adverso of the lands of Achany and others; and had, by himself, or by others in his employment or by his permission, under the false pretence of fishing for trouts, fished for and killed salmon in that river, to the injury and damage of the pursuer, who had the sole and exclusive right to the said river, and to the whole fishings thereof; and concluding that it ought and should be found, decerned, and declared, that the whole of the water and river and linn of Shinn, and the whole fishings thereof, appertain and belong entirely and exclusively to the pursuer, and that he has the only good and undoubted right of fishing in that river by the various methods permitted by law, and by which the river is capable of being fished; and further, that Glastullich has no right or title whatever to fish for salmon, or otherwise, in any manner of way, in that water and river, or in any part thereof; and that he should be prohibited and interdicted from fishing therein, to the injury and damage of the pursuer, in any way or manner, or under any pretence whatever.

Glastullich, in defence, denied that the pursuer and his authors had enjoyed an exclusive possession of every description in the river and linn of Shinn. On the contrary, the defender was infeft on titles carrying “the
 “ town and lands of Achany, and pertinents thereof,
 “ with the houses, yards, tofts, crofts, outsets, insets,
 “ shealings, grazings, woods, fishings, mosses, muirs,
 “ marshes, pasturages, commonities, liberties, privileges,
 “ annexis, connexis, dependencies, parts, pendicles, and
 “ universal pertinents thereof, use and wont, pertaining,

“ or known to belong and pertain thereto.” The defender and his authors had been for more than forty years in the open, constant, and uninterrupted use of fishing salmon, with nets, in the Shinn, both above and below the linn or fall ; and had constantly enjoyed, by themselves and servants, the right of fishing, with rods, for salmon, trouts, and other fish. The pursuer’s claim was the more extravagant as the Shinn is a river of magnitude, flowing from a lake of fifteen or sixteen miles in length, to claim the ipsum corpus or property of which was a mere absurdity ; besides, the pursuer had no right of property in any of the lands adjacent to the stream ; he was not the proprietor of the bank, and therefore could claim no right in the stream even as a conterminous heritor.

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Glastullich further maintained that the pursuer’s right only extended to a fourth of the fishing on the linn, and a half of the water of Shinn, and the pursuer, therefore, had no title to interfere with or dispute the possession of the defender so long as the defender did not encroach upon that portion of the right belonging to the pursuer.

Thereafter the pursuer brought a suspension and interdict against the defender, to have him interdicted from fishing in the river in question.

These two processes being conjoined, and the record closed : The Lord Ordinary found, “ The pursuer and 12th Nov. 1829.
 “ suspender has produced a sufficient title to the property
 “ of fishings of salmon and other fish in the river of
 “ Shinn, including the linn thereof generally, as in a
 “ question with the defender and respondent, who does
 “ not pretend any right to the said property generally,
 “ or any part thereof, but pleads a right of the nature

No. 2. " of a servitude thereon, viz. a special right of fishing
 14th May " for salmon, as well as trouts and other fish, by rods,
 1832. " spear, and net, but not by net and cobble, founded
 MACKENZIE " on a grant of lands adjoining, cum piscationibus et
 v. " pertinentibus, with forty years' possession of such
 ROSE. " special right; finds this possession wholly denied by
 " the pursuer and suspender, and therefore remits the
 " cause to the Jury Court."

The respondent reclaimed to the Second Division of the Court, in so far as this interlocutor seemed to require him to prove forty years' possession of fishing trout and other fish, exclusive of salmon, in order to establish a right thereto; and their Lordships, having ordered and considered mutual cases, recalled the interlocutor re-
 29th May 1830. claimed against, and found, " That the pursuer and
 " suspender has produced a sufficient title to the pro-
 " perty of the fishings of salmon in the river Shinn,
 " including the linn thereof generally, as in a ques-
 " tion with the defender and respondent; find, that
 " the defender and respondent has a right to fish
 " trouts in the river Shinn, so far as his property
 " extends along the said river, with trout-rods, but not
 " with net and cobble, or in any way that may be pre-
 " judicial to the salmon-fishing belonging to the said
 " pursuer and suspender; recal the interdict to this
 " extent; and, quoad ultra, remit the case to the Lord
 " Ordinary, reserving all claims to expences of process
 " for his Lordship's determination; and decern." *

Mr. M'Kenzie appealed against this interlocutory judgment, so far as it found that the respondent had right to fish trouts with trout-rods in the river Shinn, ex adverso of his property.

* F. C. and 8 Shaw and Dunlop, 816.

Appellant.—The property of the water of Shinn, comprehending the loch and linn of that name, and the whole salmon-fishings, which grant, as the superior right, includes all other fishings in this water, were feudalized as separate subjects in the persons of the appellant's predecessors upwards of a century ago; and the absolute right, both to the water or river and loch, and to the salmon fishings, is now vested, by a complete and regular progress of titles, in the appellant; under which titles he and his predecessors have enjoyed an uninterrupted and exclusive possession of the whole water of Shinn, and of the whole fishings of every description in this water, for a period far exceeding the long prescription, without any interference with this possession until the present attempt on the part of the respondent.

On the other hand, the respondent has produced no feudal title, conferring upon him or his predecessors any right of property, either in the water of Shinn or in the fishings in that water, which can compete with the title of the appellant. The respondent's infeftment in the lands of Achany and others, cum piscationibus, gives him a mere right of fishing within his own ground, but cannot confer upon him any title to trespass by fishing trouts, or otherwise, upon the water of Shinn, the absolute property of the appellant. Again, the words cum pertinentibus, while they are plainly ineffectual to confer any right of property in the fish, cannot even give him a servitude of trout-fishing in a stream belonging to the appellant, unless supported by a proof of possession for forty years. That he has had no such prescriptive possession of a right of fishing trouts in the water of Shinn must be assumed in the present state of the case, as his averment upon the

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point has been unequivocally denied, and not attempted to be supported by proof.

There is no principle of Scotch law, either express or implied, from which it can be assumed, that trouts in a river, which is the exclusive property of one person, more especially a salmon river, are a pertinent of lands belonging to another person, or are a pertinent of lands at all, or that the proprietor of the adjacent lands has any right to them, or to fish for them.

The right to fish trouts with trout-rods in the water of Shinn, ex adverso of his own property, to which the respondent has been found entitled by the interlocutor appealed from, cannot, by possibility, be exercised in any way that is not prejudicial to the salmon-fishings belonging to the appellant.—Scott, 22 July 1825, (Mor. 12,771); Town of Perth, 9 Jan. 1750, (Mor. 12,793); Dick, 16 Nov. 1769, (Mor. 12,831); Stair, II. 3, 76; Bankton, II. 3, 8; Erskine, II. 6, 6; Carmichael, 20 Nov. 1787, (Mor. 9,645, & 2 Hailes, 1,033); Forbes, 31 May 1826, (4 S. & D. 650.)

Respondent.—The appellant has produced no right in his person entitling him to interfere with the exercise of the power claimed by the respondent. The grant is not salmonum aliorumque piscium, but salmonum alone. But although the grant of salmon-fishing were as ample as it is pretended to be, it neither includes, in terminis or otherwise, a grant of fishings of a totally different nature and description, nor gives a title upon which he can either prescribe any right of the nature claimed by him, or which can compete with that founded upon by the respondent, and admitted to exist in his person.

The respondent cannot be required to prove possession of trout fishing for forty years. He has a right to the banks of the river, and therefore, even were his titles altogether silent as to fishings, he has a right to fish trout. Even the non-exercise of the right would be of no consequence, for trout fishing is *res meræ facultatis*.

The averment of the appellant, that he is proprietor, not only of the fishings upon the Shinn, but also of the water itself, is neither borne out by the nature of the titles produced by him, nor is such a right of property recognised by law.

To claim a right of property in the very *ipsum corpus* of a fishing river has more than the merit of novelty, and particularly when he must claim the river as a separate and distinct property in itself from the solum or adjacent land in which he has no right of property. Besides, it is very plain that if the appellant has no access to the stream by possessing the bank, and if the right granted to him is limited and specific, it is *jus tertii* in him to attempt to interfere with the respondent in the exercise of any rights of fishing which do not encroach upon those granted to the pursuer. The appellant must make out a full and exclusive right to every species of fishing in the Shinn before he has a title to disturb the respondent.

The only ground upon which the appellant can pretend that he has any title to interfere with the right of the respondent is, that it may be injurious to his salmon-fishing. This interest is fully protected by the interlocutor under review, which expressly guards against the right of the respondent being exercised in any manner

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No. 2. hurtful to that interest.—Craig, I. 16, 36, and II. 8, 15 ;
 14th May Stair, II. 3, 69, & 76 ; Erskine, II. 5, 15, & II. 6, 6 ;
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LORD CHANCELLOR.—Is it quite plain that the important word “piscationibus” in the respondent’s titles has been rightly transcribed ? The impression on my mind is that it should be read “potestatibus,” and that so it will turn out, if the original title-deeds are carefully examined. For that purpose, let the case stand over for further consideration.

The case having accordingly stood over, the title deeds were minutely examined, and the words were found to be, not “cum piscationibus,” but “cum potestatibus.”

On the case being again moved :

LORD CHANCELLOR.—My Lords, this case stood over for further consideration, that during the interval the deeds might be examined. I think I suggested that a word which had been read and understood to be “piscationibus,” on which a good deal was represented to turn, might, when the deeds were examined, prove to be not “piscationibus,” but “potestatibus.” Your Lordships are now informed that the examination confirms that conjecture — that the word is potestatibus. I think, however, that on the merits the case stands very much where it did ; and I shall therefore now humbly move your Lordships that the decision of the Court below in this case be affirmed ; but, in the circumstances, I shall not press on your Lordships the giving costs.

THE HOUSE OF LORDS.

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The House of Lords ordered and adjudged, " That the
" said appeal be, and is hereby dismissed this House, and
" that the interlocutor therein complained of be, and the
" same is hereby affirmed."

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FRASER—RICHARDSON and CONNELL,—Solicitors.

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No. 3. ALEXANDER BAILLIE, Appellant. — *Sir Charles Wetherell — Wilson.*

MARGARET GRANT, Respondent. — *Lord Advocate (Jeffrey) — Dr. Lushington.*

Sequestration.—The Court of Session having held that a party who had been for a short while a trader, but had totally wound up business, and, as he alleged, paid all the debts and obligations incurred while a trader, was liable to be sequestrated at the instance of a creditor, whose debt was a private debt, incurred many years before the debtor had commenced trade, but which had continued unpaid during and after his trading; on appeal, the House of Lords directed the following question to be put to the Twelve Judges: “A., not a trader, becomes indebted to B. to the amount of 100*l*. A. afterwards becomes a trader, and ceases to be a trader, never having paid his debt to B. After ceasing to be a trader, he commits an act of bankruptcy. Can B. support a commission against him upon his debt and that act of bankruptcy?” The judges declared their unanimous opinion in the affirmative.

Bankrupt.—Held, (affirming the judgment of the Court of Session,) that a party who had been charged with letters of horning, and who retired to Holyrood-house before caption could be executed against him, but who was apprehended in the sanctuary, and there and then pleaded his protection, was a notour bankrupt, within the meaning of the statute.

Bill Chamber. MARGARET GRANT presented a petition, founded on the bankrupt statute 54 Geo. 3, c. 137, continued and renewed by subsequent statutes, to the Lord Ordinary on the bills, setting forth, that she is a creditor of Alexander Baillie, (designed in the petition, creditor

of Alexander Baillie, grocer and spirit-dealer in Canongate of Edinburgh, lately residing in Cross-causeway, Edinburgh, presently residing within the sanctuary, Holyrood-house,) to the extent of 1,197*l.* 15*s.* 3*d.* sterling, with unpaid interest from 1st June 1812, contained in a decree-arbitral, dated 20th October 1812, and registered in the books of Session the day following, proceeding upon a submission entered into between the petitioner and David Littlejohn, as her trustee, on the one part, and the said Alexander Baillie on the other, dated 8th and 14th January 1812, and registered along with the said decree-arbitral: That a discharge and retrocession were executed by the said David Littlejohn in her favour: That she had made and now produces an affidavit to the verity of the debt, in which she depones, that she “believes that the said “Alexander Baillie, although for some years retired “from business, did, subsequently to the contraction “of the debt above deponed to, carry on business as “a grocer and spirit-dealer in the Canongate, and is “therefore a trader within the description of persons “whose estates are liable to sequestration under the “said statute, and not within the exceptions therein “specified:” That the said business is not yet finally wound up, and Baillie was, upon the 3d September last, charged to make payment of the debt above specified to the petitioner, in virtue of letters of horning at her instance, (raised upon the said submission and decree-arbitral,) dated and signeted the said 3d September last; and Baillie having been thereupon denounced on the 20th January last, and letters of caption, dated and signeted the 22d January last, raised at the pur-

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suer's instance, he, in order to avoid being apprehended, had retired to the sanctuary upon the 19th January last, as the messenger's certificate, dated 5th March current, indorsed upon the said caption, bears; and praying for warrant for citing the said Alexander Baillie to appear in court to show cause why sequestration should not be awarded against him; and if he should not appear, or so appearing should not instantly pay or satisfy the debt due to the petitioner, or to any creditor or creditors who may appear and concur in this application, or show other reasonable cause why the sequestration should not proceed further, then to sequester the whole estates and effects, heritable and moveable, real and personal, of the said Alexander Baillie, for the benefit of his whole just and lawful creditors: with the other usual conclusions in like cases.

Baillie answered, that in the year 1829, the petitioner brought an action against him, before the Court of Session, for payment of the same debt upon which her present petition is founded, and which was constituted by a decree-arbitral as far back as the year 1812. The sum in that decree-arbitral, however, was not due by him to the petitioner, for he had counter claims against the petitioner to a much larger amount. Accordingly, nothing more was heard of it till after the lapse of seventeen years. When the case came into court, defences were given in; and the petitioner was appointed to condescend. Insetad, however, of lodging the condescendence, she gave a charge of horning upon the recorded submission and decree-arbitral, and that without abandoning her cause in the Court of Session. She also, in the course of last year, founding upon the

decree-arbitral, after having previously arrested the rents, adjudged a house in Queen Street, belonging to him, worth about 900*l.*, and not encumbered with any debt. And then, after having pursued him with messengers, and obliged him to retire to the abbey to escape imprisonment, she has presented the present petition for a mercantile sequestration of his whole means and effects under the statute quoted.

It is plain, therefore, that the petitioner does not possess the proper character of creditor, to be entitled to pray for sequestration against the defender. His action, and the counter claims on which his defence is founded, must first be disposed of; and it is not a sufficient answer to this objection, that the petitioner's claim on the decree-arbitral is liquid, and his counter claims illiquid; for the whole effect of the decree-arbitral, and of his counter claims, and consequently the question, whether the petitioner is his creditor or not, has been rendered litigious by the petitioner herself, and is now sub judice in the Court of Session.

But there remain other insuperable objections to the prayer of the petitioner.

The debt, forming the basis of the decree-arbitral, arose in an accounting between the defender's wife and her sisters (one of whom is the petitioner), relative to a property in which they were co-heiresses. It was entirely a private debt, and had no relation to business at all. He was then engaged in no trade, nor did he stand in any situation on account of which his estate could be sequestrated. He continued to live as a private individual, engaged in no business of any kind, till about the year 1819, seven years after the date of the

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decree-arbitral, when he commenced, and continued for one year, but for one year only, the business of a spirit-dealer. This took place ten years ago, and except then, and since then, he has been engaged in no business whatever. Before he shut his shop he paid every shilling of debt which he had contracted in the business; indeed the whole was finally wound up ten years ago. He is not, therefore, included in the description in the statute of a "merchant or trader who seeks his living " by buying and selling."

It is not enough to say, that a person was once in trade. No doubt, where insolvency is occasioned by former transactions as a trader, or if the debt of the petitioning creditors arose in the course of these transactions, the character of trader continues to the effect of supporting the sequestration. This is expressly laid down by all our best authorities. But here the defender is not insolvent; the debt of the petitioner had no relation to trade; and no debts exist contracted during the short time he was a trader. Indeed, this is admitted by the petitioner herself in her affidavit, and proved by the decree-arbitral.

But while the petitioner is not a creditor entitled to sequestrate, and the defender not a party subject to be sequestered, neither has he been rendered bankrupt within the meaning of the bankrupt statute. The letters of horning were dated 3d September 1829, and the defender was denounced on the 20th of the following January. Letters of caption did not issue till the 22d of that month. But before that date, namely, on the 19th of January, the defender had retired to the sanctuary; so that the caption neither was nor could be

executed against him. No doubt the messenger tried to go through the ceremony of apprehension within the sanctuary, but that was quite idle and futile.*

A record having been prepared and closed, the cause came before the First Division, when "The Lords repelled the objections, sequester the whole estate and effects of the said Alexander Baillie, in terms of the statute; appoint the creditors to hold two meetings at the place and the times specified in the note, and for the purposes mentioned in the petition, as directed by the statute; grant commission as prayed for; ordain the petitioner to advertize the sequestration, and times and place of the meetings, in the Edinburgh and London Gazettes, in the usual form."†

Baillie appealed.

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May 20, 1830.

Feb. 3, 1832.

Feb. 13, 1832.

Appellant.—The appellant is not now, and has not been for many years, engaged in trade, or in any other mode of life falling within the description of the bankrupt statutes, as making him liable to sequestration; and it is no relevant ground of sequestration that the appellant was engaged in trade as a spirit-dealer from 1819 to 1820, seeing, not only that the respondent's debt did not arise out of that trade, or out of any transaction connected with it, but that the concern was many years since finally and absolutely wound up, and that no debt arising out of it now exists, or presses against the appellant.

* Baillie also maintained that, assuming that the caption had not been validly executed against him, the sequestrating act could not found on any arrestment or adjudication, to eke out the bankruptcy, as those were not alleged in her petition, which formed the basis of the whole proceeding.

† Shaw and Dunlop, 778.

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When, as in the present case, the debtor himself does not concur in the petition for sequestration, it is necessary that the debtor should have been rendered bankrupt in precise terms of the statute; but the appellant has not been rendered bankrupt in terms of the statute, in respect he was not under diligence by "horning and caption" (an essential ingredient towards creating notour bankruptcy) when he retired to the sanctuary, and that he was not made bankrupt by any other mode of diligence provided as an equivalent in that case.

Sequestration, being a proceeding strictly statutory, cannot be awarded in respect of any supposed or alleged grounds of equity, or as a means of compelling payment of debt, where the statutory requisites have not been complied with, in the description of the debtor, the nature of the petitioning creditor's debt, and the diligence founded on as constituting bankruptcy. — *White*, 25th November 1800, (*Mor. Ap. v. Bankrupt*, No. 12); and cases relied on by the respondent.

Respondent. — The respondent was, at the date of her petition, and still is, a creditor entitled to apply for and claim in the sequestration, without concurrence of the appellant.

The act 54 Geo. 3, c. 137, § 15, requires that a single petitioning creditor shall have an actual claim, whether liquid or not, amounting to 100*l*. Now the claim of the respondent exceeds the requisite amount, and was liquidated by decret-arbitral, with clause of execution, so far back as 1812. On the other hand, the appellant did, on the 12th of March 1830, when the petition for sequestration was presented, and

still does, bear the character which makes him liable to sequestration under the bankrupt statutes.

It is admitted by the appellant, that he acquired in 1819 the character of a mercantile trader, by beginning business in the Canongate of Edinburgh as a spirit-dealer. It is plain, that during that time he fell under the description of persons subject to sequestration. The respondent does not say that he now does, or did on the 12th of March 1830, the date of presenting the petition, carry on business; but she maintains, that debts directly contracted by him during the time when he was a trader were, on the 12th of March 1830, and still are, unpaid by and pressing upon him*; that principal sums owing by him before his entry into business were resting owing by him throughout his trading, and are still owing by him; and that the interests of these principal sums, which became payable at their respective terms during the period he was a trader, are still owing by him, and must be regarded in the same light as a new contraction while a trader, and consequently forming a good petitioning debt.

The appellant was, at the date of the respondent's petition, liable to sequestration under the bankrupt act as a notour bankrupt. He had been charged on letters of horning, denunciation had followed, and he had been apprehended within the sanctuary by a messenger on the caption, and having pleaded the protection which he had obtained from the officer of the sanctuary, he thereby "fled for his personal security," and became notour bankrupt, and such has been the invariable course of

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* This was denied by the appellant; but the question of law which was raised did not require that the fact should be ascertained.

- No. 3. establishing bankruptcy in all similar cases.—2 Bell, 316; Dick, 28 Jan. 1815, (F.C.); Cramond, 21 Feb. 1815, (F.C.); Low, 8 July 1815; Fraser, (7 S. & D. 217); Cook, 21 Feb. 1829, (7 S. & D. 452).
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LORD CHANCELLOR.—My Lords, very considerable doubt having been entertained in one stage of this argument, respecting certain points of practice, which were decided by the Court below, and that doubt having pressed upon the minds of some members of your Lordships' House until the last day of hearing, I am happy in being able to state, that a communication with the north has been the means of procuring information which has tended very greatly to relieve us from the pressure of those doubts; upon this matter of practice, therefore, respecting the petition of sequestration, horn-ing, and caption, upon which, apparently, the learned judges felt so little doubt, that they unanimously repelled the objections without hearing the other party, your Lordships will naturally feel the greatest possible desire to defer to the authority of the learned judges. But there is another point which requires your Lordships' attention, and upon which I should wish for an opportunity of making further inquiry, before I move your Lordships to proceed to judgment. On the other part of the case I feel no doubt at all.

LORD CHANCELLOR.—My Lords, when this case was before your Lordships, various questions were discussed respecting the payment of debts contracted during the trading, and remaining unpaid after the trading had ceased,—upon these your Lordships entertained no doubt, but one remained, of

which I am now about shortly to remind your Lordships. It was felt, that even if those points were well decided in the Court below, there still remained an important question, Whether, known or not known, a debt having been contracted before the trading commenced, and continuing unpaid after the trading ceased, and consequently the trading continuing through the whole period, that debt was sufficient to support the sequestration, upon an act amounting to ground of sequestration, committed after the trading ceased? In order to decide that question, it was necessary that some attention should be paid to the cases which it was said bore upon the point. On looking into those cases both then and since, it appears that that point never has been expressly decided in this House, nor in the Court from which this case was brought by appeal; but it being felt that there is no difference between the principles which ought to apply in Scotland and in England, as governing the decision of this question, it became desirable to know what had been decided on this point in the English Courts. I for one am ready to admit, that at all events it would have been impossible for us to follow the decision of the English Courts, unless we saw most clearly that we were called upon to adopt, in a case arising in Scotland, the same principles that had been applied in a similar case which had arisen in England, and which had governed the decision of the English Court. This being a point of very considerable importance, I have felt it to be my duty, though it is a Scotch case, to propose to your Lordships to require the attendance of the learned judges, for the purpose of hearing the point argued as applied to an English case, and of putting questions to

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them, which I am now about humbly to move;—I do therefore move your Lordships that the learned judges be desired to give your Lordships their opinion on this question,—“ A., not a trader, becomes indebted to B. to “ the amount of £100. A. afterwards becomes a trader, “ and ceases to be a trader, never having paid his debt “ to B. After ceasing to be a trader he commits an “ act of bankruptcy. Can B. support a commission “ against him upon his debt, and that act of bank- “ ruptcy?”

The question proposed having been argued by Mr. Wilson for the appellant and the Lord Advocate for the respondent, before the Lord Chief Justice of the Common Pleas and the other Judges, the learned judges requested time to consider the same.

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Thereafter, the judges having attended, the Lord Chief Justice Tindall delivered the unanimous opinion of the judges.

LORD C. J. TINDALL.—The question proposed by your Lordships to his Majesty’s Judges is this:— A., not a trader, becomes indebted to B. to the amount of 100*l*. A. afterwards becomes a trader, and ceases to be a trader, never having paid his debt to B. After ceasing to be a trader he commits an act of bankruptcy. Can B. support a commission against him upon his debt, and that act of bankruptcy? Upon this question, the judges who have heard the argument at your Lordships’ bar are of opinion that a commission may be supported against B. upon the debt and act of bankruptcy above supposed. It has been decided, and has long been considered as law, that a debt contracted before a man enters into trade, but continuing unpaid at and after the time he is in trade,

is a sufficient debt to support a commission taken out against him upon an act of bankruptcy committed whilst he is a trader. (See the case of *Butcher v. Easte*; Dougl. Reports, 295.) It has also been established beyond dispute, that a petitioning creditor's debt, contracted during the trading of the debtor, will support a commission taken out against him, on an act of bankruptcy committed after the trading has ceased. This point has been settled to be law by various decisions, commencing with that of *Heyler v. Hall*; Palmer's Reports, 325, and ending with that of *ex parte Bamford*, 15 Ves. jun. 458. But it is contended, that although each of these propositions be true separately, yet that no inference can be drawn from them, that the debt contracted before the trading, but subsisting during its continuance, and the act of bankruptcy committed after the trading, will support a commission. We think, however, that no valid or substantial distinction, in this respect, can be drawn between the debt contracted before, and that contracted during the trading. The debt contracted before trade, but remaining unpaid at and after the time the debtor enters into trade, appears to us to be a subsisting debt for every purpose, and subject to every consequence which belongs to a debt originally contracted during trade. It is the same with respect to the trader's ability to carry on his trade. The money lent to the person who afterwards commences trade may be, and often is, the very capital upon which the trade itself is carried on. At all events, the credit given to the trader, by the forbearing to demand repayment, is one of the sources from which such capital is derived, and is the same in effect as a new loan. Again, the debt is attended in both

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cases with the same consequences as to the trader's ability to repay it, for in each the power of repayment is equally affected by the success or failure of the trader. No one would contend that a debt contracted during the period of trading, though not a trade debt, but contracted for private purposes, and applied to private occasions perfectly distinct from the trade, is to be considered as differing in any respect from a debt contracted in the course of the trade itself. It seems rather an artificial distinction than a substantial difference, to hold that the debt contracted after the trading has commenced shall support the commission taken out on an act of bankruptcy, committed after the trading has ceased, but that the debt contracted before the trading, but continuing afterwards, shall not be attended with the same consequence. If a commission cannot be supported under these circumstances, a trader, by giving up his trade, which is a voluntary act on his part, would have the power of depriving his former creditors of the benefit of enforcing an equal distribution of his effects amongst all his creditors, and would be enabled to pay his subsequent creditors out of the very funds furnished or increased by those who were his creditors before he began trade. And upon referring to the bankrupt acts, there does not appear to be any distinction created between these two classes of creditors as to the right to petition for a commission. The first statute which mentions a commission is the 13th Eliz. cap. 7. sec. 2. which states in the most general terms, "that the Lord Chancellor for the time being, upon every complaint made in writing, against such person or persons being bankrupt, as is before defined, shall

“ have full power by commission under the Great Seal
 “ to name, assign, and appoint the persons therein
 “ described.” And all the subsequent statutes contain
 an enactment similar in effect to that in the 6 Geo. 4.
 the present Bankrupt Act; viz. that the Lord Chan-
 cellor shall have power, upon petition made to him
 in writing, against any trader having committed an
 act of bankruptcy, by any creditor or creditors of
 such trader, to issue his commission — words which
 comprehend equally all creditors for debts existing
 during the trading, whether contracted before or after
 the commencement of the trading. The principal stress
 of the argument at your Lordships’ bar was placed,
 first upon the precise language used by the judges in
 the cases above referred to, wherein they assign the
 reason for their opinion, that the debt grew during the
 trading. But in those cases the judges speak with
 reference to the particular facts of the cases immedi-
 ately before them; and such expression affords no
 necessary inference, that if the cases then under dis-
 cussion had, like the present, been cases of a debt
 remaining and continuing during the trading, their
 conclusion, drawn from the other facts, would not
 have been precisely the same. Again, it has been
 argued, that the statutes only authorise the suing out
 a commission against a person using the trade of mer-
 chandise, by buying and selling, &c. And that the
 ground upon which a commission is allowed to be sued
 out on an act of bankruptcy, committed by the debtor,
 after he has ceased to trade, is, that he cannot be con-
 sidered as having left off trade whilst any of the debts
 contracted during trade are still unpaid. But if the

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debts contracted before, but continuing after, are virtually and substantially the debts of the trader, whilst a trader, as we think they are, the words of the statute which are allowed to extend to the one, ought, in reason, to be held to include the other also. Upon the whole, we think, that both upon the reasonableness of the thing, and also upon the proper construction of the bankrupt acts, a commission may be well supported under the circumstances supposed in the case submitted to us by this House.

LORD CHANCELLOR.—My Lords, the rest of the case having been disposed of after the first argument, the only point remained, upon which the learned judges have now delivered their unanimous opinion. It appeared to me that the case should be argued before the learned judges, inasmuch as it was necessary to see whether the same principles would be equally applicable to English bankruptcy and Scotch sequestration. This was a point on which the decision of your Lordships must be entirely founded; and his Majesty's judges having now delivered that opinion, which removes the only doubt remaining in the case, enables me at once to move your Lordships that the interlocutor be affirmed. But on the consideration of this being a case of first impression in Scotland as well as in England, the question never having been decided in either country before, I shall move your Lordships to affirm it, without costs.

“ The unanimous opinion of the judges having been
 “ delivered this day upon a question of law to them
 “ propounded, and due consideration had of what was

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“ offered on either side in this cause,” the House of Lords ordered and adjudged, “ That the petition and appeal be “ and is hereby dismissed, and the interlocutor therein “ complained of be, and the same is hereby affirmed.”

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**CRAWFURD and MEGGET — SPOTTISWOODE and
ROBERTSON, — Solicitors.**

[19th June 1832.]

No. 4. *Ex parte* Earl and Countess of STRATHMORE, Appellants.
Dr. Lushington.

WILLIAM EWING, Respondent.

Bill of Exchange—Husband and Wife.—Held, (affirming the judgment of the Court of Session,) that a party sued for payment of acceptances found in his deceased agent's repositories is not entitled to enter into an accounting on vague allegations of intromissions by the agent, the creditor in the bills, it being admitted that the defender had received great advances from the agent, and the correspondence proving that, after the date of the bills sued on, the agent complained to the defender that no exertions had been made towards repayment. Found, (reversing the judgment of the Court of Session,) that it is incompetent for a married woman to make herself liable upon bills of exchange.

2d Division. **E**ARLY in the year 1816 John Buchan, writer to
 Ld. M^cKenzie. the signet in Edinburgh, entered, in his professional capacity, into the management of the Earl's (then Mr. Bowes) affairs, which had, previous to that time, got into considerable embarrassment.

Buchan's management continued for many years, in the course of which various bill transactions took place, in which his name was interposed, and various securities and effects belonging to the Earl were put into his hands. The bill transactions latterly became very numerous and complicated, and parties originally unconnected were from time to time drawn into them; and it was alleged that most of these transactions were

entered into for the purpose of raising money at the banks, without any sum being actually advanced at the time by the drawer to the acceptor, and that one bill was often granted in order to raise means for retiring or paying a former one.

Buchan died in August 1822, leaving his whole affairs in a state of great confusion. This event occurred without his having furnished to the Earl any accounts either of his advances for the Earl, or of his intromissions with the effects and securities which had from time to time been made over to him, belonging to the Earl.

Some time after his death, William Ewing, having been decerned executor qua creditor, in virtue of a debt due to him by the deceased, took the management of his concerns, and assumed the possession of the effects and documents found in Buchan's repositories.

Thereafter Ewing commenced an action against the Earl and Countess for constitution and payment of certain promissory notes found among Buchan's papers, and drawn or accepted by Lord and Lady Strathmore.

The defenders put in a general defence, that Buchan, like every other agent or manager, was bound to have rendered a specific account of his intromissions, on which alone the justice of the claim, made upon insulated transactions, could in any way be ascertained. There was also, in the course of the discussion, a written correspondence between Lord and Lady Strathmore and Buchan produced in process, in which the former uniformly acknowledged the pecuniary obligations under which they lay to Buchan; and, in particular, a letter by Buchan, of date posterior to the bill sued on, stating, that his advances had swallowed up his whole property,

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- No. 4. and complaining that no exertion had been made on his Lordship's part to repay him; and an answer from Lord Strathmore expressly admitting the great extent of his obligations. The Lord Ordinary decerned in terms of the libel, with expences, and adhered, on advising representation and answers.
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 June 17, 1824.
- In a second representation the Earl and Countess set up the defence, that it was incompetent to direct this action against Lady Strathmore, a married woman; and they craved access to Buchan's whole books and papers, or a diligence to recover these documents, and such other documents as might be necessary for the defence, so that the real state of accounts between the parties might be ascertained. The Lord Ordinary appointed the representation to be seen and answered, in so far as regarded Lady Strathmore, but quoad ultra adhered; and on the defenders reclaiming to the Inner House, their Lordships also adhered.
- July 10, 1824.
- Nov. 23, 1824.
- The Earl then raised an action of count and reckoning against the representatives of Buchan, and for a second time reclaimed, repeating his general defence, and enumerating various intromissions of Buchan, of which no account had ever been rendered; and also stating specific objections to the particular bills of which payment was concluded for in the original summons; and he repeated his demand for a diligence to recover the above-mentioned books and documents. But their Lordships, having advised the petition with the answers, adhered.*
- Dec. 13, 1825.

The reserved question as to the liability of the Countess of Strathmore remained to be discussed; but

* 4 Shaw and Dunlop, 310.

before the case could be advised, the pursuer craved an immediate decree, on the ground of an adjudication having been led by another creditor against the separate estate of Lady Strathmore, which would exclude Ewing, unless he also led an adjudication within year and day thereof. The Lord Ordinary therefore decerned "in terms of the conclusions of the libel, but finds no expences due to either party in hoc statu; grants warrant for extracting the said decree immediately, and dispenses with the minute book; reserving to the defenders all their defences, and all objections competent against the said conclusions of the libel, as objections contra executionem."

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Thereafter, the Lord Ordinary, having resumed consideration of the question raised for the Countess of Strathmore, in respect of the decret of constitution already pronounced, and under the reservation therein mentioned, "refused the desire of the representation as to the Countess of Strathmore, and adheres to the interlocutor represented against." And on reclaiming by note to the Inner House, their Lordships, "in respect it is admitted that the decree in this cause has been extracted, refuse to send the note to the roll."

Jan. 24, 1827.

Feb. 8, 1828.

The Earl and Countess appealed. No appearance was made for the respondent.

Appellants.—Considering the relative situations of agent and client, in which Buchan and the Earl stood to one another for so many years,—the long train of transactions and intromissions which took place between them, both in relation to bills and other matters,—and the object for which, in general, these bills were

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granted or negotiated, the respondent, as executor-creditor of Buchan, who had all the documents on both sides relative to those matters, is not entitled to pick out and select from the repositories of that gentleman such individual bills or documents as may best serve for the foundation of an action against the appellants, and to pursue for payment of these, without first, or at least unico contextu, exhibiting an account of Buchan's intromissions, and showing the state of the whole transactions between him and his clients, the appellants.

The appellants were entitled to a diligence to recover the papers and account-books in the repositories of Buchan, and relative documents, regarding their various transactions; and had this diligence been granted they could have proved that the bills in question were not due by them to him. But even independent of such diligence, they have been able to point out various intromissions with their funds by Buchan which have never been accounted for, and for which no credit is given in the present action; and an account of these has been demanded, in the action of count and reckoning raised against Buchan's representatives, by the appellants, since the commencement of the present action.

The appellants have also been able to state specific objections to the particular bills of which payment is demanded by Ewing; but this could be more satisfactorily done by production of the whole documents, books, and accounts, and an investigation of these by a professional accountant.

But on another ground the judgment of the Court below is clearly untenable. Certain of the bills and

notes libelled on in Ewing's summons have the name of the appellant, Lady Strathmore, as joint acceptor, upon them; and for these decree has been pronounced against her individually, and steps have been taken upon that decree against a separate estate which she has, exclusive of the *jus mariti*. But this is contrary to the principle of the law of Scotland, established by a long train of decisions, that *fœmina vestita viro* is not capable of incurring a personal obligation, even with the consent of her husband. — *Stair*, I. 4, 16; *Ersk.* I. 625; *Banks*, I. 5, 73; *Greenlaw*, 24 March 1626, (*Mor.* 5,957); *Mitchelson*, 30 Jan. 1635 (*Mor.* 5,960), and other cases *voce Husband and Wife*; *Dollar*, 10 Feb. 1827, (5 S. & D. 333.)

LORD WYNFORD: — My Lords, in this case of Lord and Lady Strathmore against Ewing, your Lordships are placed in rather an unpleasant situation. It was an *ex parte* proceeding, and I was afraid of giving judgment in it yesterday, having heard only one side, and thought it right, not to advise your Lordships to dispose of the case finally, till I had had an opportunity of reading every paper belonging to it. This was an action brought to recover the amount of certain promissory notes and bills of exchange. These bills and notes are found in the hands of Buchan, the person whom the pursuer in the action below represents. There is evidence that these bills of exchange were paid by him, and he is entitled to recover to the extent of these bills. With respect to the promissory notes, many of them are joint promissory notes by Lord Strathmore and Buchan. Now, without some evidence, it would be presumed that they were given for a joint debt; and it would be improper to charge Lord Strathmore with the whole. But,

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upon looking into the printed cases, I find that the judges below state, that there is very satisfactory evidence that these promissory notes were given for the benefit of the Earl of Strathmore; and if they were paid by Buchan, he has a right to recover for that amount in this action.

The letters are not so explicit as I could wish, but they prove that most of these transactions, if not the whole, were for the accommodation of the Earl of Strathmore; and that this unfortunate man, Buchan, had been reduced to beggary by the advances he had made for Mr. Bowes before he became Lord Strathmore, and for the accommodation he afforded him, by becoming security for him upon these bills. There is one letter written after these transactions were closed, in which that is distinctly stated. It was argued that there was an account between the parties, and that your Lordships could not proceed till that account was taken. But after the letter written from St. Omer, long after the transaction had closed, it is clear that in this case Buchan became a party to these bills to save Lord Strathmore, and that has happened in this case which too often occurs, namely, instead of one, both are ruined together. I cannot, therefore, advise your Lordships, though we have heard nothing on the other side, under all the circumstances, to reverse that part of the judgment. But it appears, that in the course of these transactions, Lady Strathmore, then Mrs. Bowes, was in the habit of drawing promissory notes and bills of exchange to raise money; and upon these securities she is proceeded against as an unmarried woman. Now, by the law of England, it is perfectly clear, that an action cannot be maintained against a married woman for the amount of such securities; and that law is founded upon

sound sense and wise policy. Upon looking into the Scotch authorities, I find that the law is the same in Scotland as in England. It appears to me to be satisfactorily made out, that though a married woman, with certain solemnities that are intended to guard her from the attempts of designing persons, may bind herself in regard to her own property, that an action cannot be maintained against her on bills or notes. I have read the report of this case, and it does not appear to me that this point was raised in the Court below; the Court could not have pronounced the decision they have pronounced, if that question had ever been raised. I, therefore, recommend to your Lordships to reverse that part of the interlocutor in which the judgment is given against Lady Strathmore, and dismiss the appeal upon that part of the subject that relates to Lord Strathmore.

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The House of Lords ordered and adjudged, "That the
"interlocutors complained of, in so far as the same have
"relation to the appellant the Earl of Strathmore, be, and
"the same are hereby affirmed, and that the said appeal be,
"and the same is hereby in so far dismissed this House:
"And it is further ordered and adjudged, That in so far as
"the said interlocutors have relation to the appellant the
"Countess of Strathmore, or her separate estate, such inter-
"locutors be, and the same are hereby reversed."

VIZARD & Co.—Appellants' Solicitors.

[5th July 1832.]

No. 5. Duke of HAMILTON and BRANDON, Appellant.—*Lord Advocate (Jeffrey) — Follett.*

GEORGE ROBERTSON AIKMAN Esq., Respondent.—*Dr. Lushington — Merewether.*

Servitude.—In an action by the proprietor of houses and gardens in the town of Hamilton, to declare his right, generally, to take sand and gravel from the banks of the river Clyde, the property of another party, found (reversing the judgments of the Court of Session,) that, under his summons, he was not entitled to found upon the possession of persons, proprietors, and occupiers of houses and gardens in the town of Hamilton similarly situated with his houses and gardens, but had a title only to insist as one of the inhabitants of the town, or as owner of certain lands therein, to the effect of having his right of servitude, in right of and for the use of his own properties, tried by a jury.—Circumstances under which the claimant to a right of servitude held to be not bound, in order to support his action, to plead a right of common to the subject to which the alleged servitude attached.

2d DIVISION. **T**HIS appeal arose out of conjoined actions of advocacy and of declarator, raised at the instance of Aikman against the Duke of Hamilton; which also brought up two applications for interdict, originally instituted in the Sheriff Court, at the instance of these parties against each other.

Lord Medwyn.

The questions at issue related, on the one hand, to the right of Aikman to take sand and gravel from the banks of the river Clyde by a road or passage entering from the end of the Hamilton Bridge, a

servitude or right prescribed, as was alleged, by immemorial usage; and, on the other, to the right of the Duke to exclude or prevent the exercise of that servitude, upon the ground, as was alleged, that it never existed, and that the sand and gravel, with the roads leading thereto, belonged in property exclusively to him.

The summons of declarator, inter alia, stated, that the pursuer in the action (Aikman) was proprietor and possessor, duly infeft, of the lands of Ross and Whitehill, lying in the parish and forming part of the barony and regality of Hamilton, and also proprietor of several houses and gardens within the burgh of Hamilton: That from time immemorial the pursuer and his predecessors in these properties had, in common with the other proprietors and inhabitants of the burgh and barony, enjoyed and exercised the right of taking sand and gravel from the river Clyde or its banks at any place found most convenient betwixt the mouth of the Avon and the mouth of the Hamilton Burn; and had also enjoyed and exercised a right of ingress and egress in various directions for that purpose, although, for a considerable time past, the principal road or entry had been by a passage which entered at or near the lower end of Hamilton Bridge on the left bank of the river, and by another passage which entered at or near the lower end of the bridge on the right bank of the river: That the ground lying contiguous to the sand and gravel on the left or western bank of the river, and consisting of several acres, extending from the bridge to the mouth of the Hamilton Burn, was originally, as well as was then, believed to be a common belonging to the burgesses and inhabitants of the town of Hamilton, who, for a period

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past all memory, had been in the practice of using it for bleaching their clothes, pasturing their cattle, and for other purposes: That for some time past the Duke of Hamilton and Brandon, whose ancestors had purchased, at different periods, the small adjoining properties, had, without any right or title whatever beyond mere tolerance, assumed and occupied that piece of ground or public property, in the same way as if it had originally belonged to him, or formed part of his own pleasure-grounds, notwithstanding the pursuer's undoubted right and title still to exercise and enjoy the free and uninterrupted right above mentioned; and that the Duke had some time ago formed the unwarrantable resolution of inclosing the banks of the river Clyde, for the illegal purpose of depriving the pursuer and others of that right, and with this view had caused a gate to be put across the roads or passages situated at the ends of the Hamilton Bridge, and had further asserted that the gravel-bank belonged in property exclusively to him, and that he was entitled to refuse all access to it, and to prevent sand or gravel being removed, except upon permission previously asked and obtained from him or those acting under his employment: That in this way an illegal and unwarrantable attempt had been made, on the part of the noble defender, to obstruct and impede the free and formerly uninterrupted access to the gravel-bank, as well as to deprive the pursuer and others of the undoubted right and privilege belonging to them of uplifting and away-taking sand and gravel therefrom at pleasure, as the pursuer and others had been accustomed to do for time immemorial: That the Duke refused to remove these obstructions from the accustomed roads or passages to the sand and gravel bank,

at least to leave the gate unlocked, to the effect that the pursuer, and others his tenants and possessors of the several heritable subjects before mentioned, might have at all times a free and ready access through the same; and to desist and cease from making any encroachments and innovations on the pursuer's rights, and from molesting or interrupting him in the free use, exercise, and enjoyment of the right of passage, and privilege of uplifting and away-taking the sand and gravel, according to use and wont: And therefore the pursuer concluded to have it found and declared, that the pursuer had, along with others, a right of access at all times to the sand and gravel bank, for the purpose of taking sand and gravel when it suits his convenience; and that the defender should be prohibited and discharged from interrupting the pursuer and others from the exercise of their right, servitude, and privilege, and be liable in damages for having shut up the access to the sand-bank.

The Duke stated in defence, 1st, That the pursuer has produced no title, by grant or otherwise, to the privilege here claimed. 2dly, That this privilege is not one of the ordinary predial servitudes recognized in the law of Scotland to which a prescriptive right can apply, and is not, from its nature, capable of that continued use of possession which is necessary to the plea of prescription. 3dly, That even if this were a right which could be acquired by prescription, the pursuer and his predecessors have not, in point of fact, acquired any such right. The defender and his predecessors have been, in virtue of their title-deeds, vesting in them the exclusive right of property, in possession of the lands comprehending the sand-bank in question ever since 1708, greatly more than forty years before the institu-

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- No. 5. tion of the present action ; and this portion of his estate
 has for many years formed part of the park and pleasure-
 ground of the palace of Hamilton.
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- June 11, 1829. On the record being closed, the Lord Ordinary
 “ found it competent to establish a servitude, as is here
 “ concluded for, by prescription, without any specific
 “ grant, on the ground of uninterrupted use and pos-
 “ session ; and that the pursuer (respondent) has made
 “ relevant allegations sufficient to entitle him to a proof ;
 “ and with these findings remits the case to the Jury
 “ Court.”
- Nov. 14, 1829. The Duke having reclaimed to the Inner House,
 their Lordships recalled “ the findings of the interlocutor
 “ reclaimed against in hoc statu, sustain the pursuer’s
 “ title to insist, and remit to the Jury Court quoad
 “ ultra.” *
- Feb. 18, 1830. Thereafter the cause was transmitted to the Jury
 Court, to prepare issues for trial ; but a difference
 having arisen in regard to their preparation, the case
 was, of consent, “ remitted back to the Court of Session,
 “ in order to determine the extent to which the sum-
 “ mons is relevant, and particularly with a view to the
 “ following questions: primo, Whether, under the
 “ summons, the pursuer, now respondent, is entitled
 “ to plead that there is no right of any kind in the
 “ defender to the sand and gravel bank libelled ?
 “ secundo, Whether, in this process, the pursuer is
 “ bound to plead that he himself has a right of com-
 “ monty in the said sand or gravel bank ? tertio, Whe-
 “ ther, under the said summons, the pursuer is entitled,
 “ under his right of servitude or privilege, to found

“ upon the possession of any persons other than him-
 “ self and his predecessors or authors, or his or their
 “ tenants?”

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Under this remit, the Second Division found,
 “ 1st, That, under the summons, the pursuer is en-
 “ titled to plead that there is no right of any kind in
 “ the defender to the sand and gravel bank libelled;
 “ 2dly, That in this process the pursuer is not bound
 “ to plead that he himself has a right of common in
 “ the said sand or gravel bank; 3dly, That, under the
 “ summons, the pursuer is entitled, in support of the
 “ conclusions thereof, to found upon the possession of
 “ persons, proprietors and occupiers of houses and
 “ gardens in the town of Hamilton, similarly situated
 “ with the pursuer’s houses and gardens there; and,
 “ with these findings, remit the case back to the Jury
 “ Court, reserving to the Jury Court all questions as to
 “ expenses hinc inde.” *

The Duke of Hamilton appealed.

Appellant.—The respondent has not set forth any July 5, 1832.
 sufficient title to insist in this action. He does not
 allege that he holds a special grant of the right here
 claimed, or that the title-deeds of his estate of Ross,
 or of those houses in the burgh of Hamilton of which
 he is proprietor, contain any clause inferring any such
 burden on the appellant’s estate. The respondent founds
 his claim upon alleged usage alone.

No doubt a right of proper servitude may be acquired
 by a dominant tenement—as part and pertinent of
 lands—by continued usage, without any express grant

* 8 Shaw and Dunlop, p. 943.

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from the proprietor of the servient tenement; but the right here claimed is not one of the servitudes recognized in the law of Scotland. It is a right totally without precedent. It is not properly a servitude, the precise extent of which can be defined, but a claim to take away the solum, and to deprive the appellant of the land itself; and this alleged right to the substance of his estate is restricted within no conceivable limit. It is not confined to the use of the properties of which the respondent is owner, but may at his will or caprice, if he prevail in this action, be extended to the whole gravelly land on this part of the banks of the Clyde to any extent; and, if he find it a marketable commodity, he may not only carry it off for the use of himself for every tenement of which he is proprietor, but may dispose of it ad libitum by sale to others. It is very clear that such an anomalous right cannot be acquired by mere usage.

But even if the respondent's title were sufficient, he has stated no relevant allegation of possession. The mere fact of sand and gravel having been taken from the appellant's estate is not sufficient per se to establish such a servitude. A pursuer is not entitled to require a defender to take any issue in any action instituted for the purpose of vindicating a right. The defender in possession may stand upon his right, and is not bound to assist the pursuer's case by proving any thing. The appellant and his authors having, in virtue of their title-deeds, been in possession of the lands comprehending the sand-bank in question for a period greatly beyond forty years before the institution of the present action, he is not bound to take an issue to prove his right to this sand-bank, any more than to establish his

right to any other part of his estate ; and even if he could be required in this action to prove his right to land of which he is in possession, that right, depending upon the import of feudal titles, must be decided by a court of law, and does not form a proper question for a jury trial.

Neither is the respondent entitled to what he terms “ a negative issue,”—that there is no right of any kind in the appellant in the bank in question. The respondent does not anywhere allege that he himself is proprietor of this sand-bank ; and therefore there are no termini habiles in this action to entitle him to a proof that the appellant is not proprietor. If the parties could be compelled to join issue on such a proof, the appellant might in like manner be bound to enter into similar discussions, with all and sundry, with regard to every other portion of his estate.

Further, the respondent is only entitled to vindicate the right of servitude claimed by himself and his tenants as proprietor and occupants of the estate of Ross, and of certain houses in the town of Hamilton. It is too plain for argument, that the respondent cannot found on the possession of parties similarly situated as proprietors and occupiers in Hamilton with the respondent ; and even in point of form there are no termini habiles in the summons to authorize any issue with regard to the use of this alleged servitude by those who are not parties to the suit. In all predial servitudes it is necessary that there should be both a servient and a dominant tenement, and the proprietor of the servient tenement is entitled to resist any proof, as to the extension of the servitude, beyond what applies to the uses and purposes of the property of

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the pursuer of the action; nor can he, in an action insisted in by the pursuer alone, have such a right of servitude established against him in the person of others.—Stair, II. 7, 5, &c.; Sinclair, 10 Feb. 1779, (14,159); Earl of Morton, 20 June 1760; Wolfe Murray, 8 Dec. 1808, (F. C.)

Respondent.—The respondent has a good and sufficient title to pursue, and to a negative issue that there is no right of any kind in the appellant to the sand and gravel bank in question. He is also entitled to plead, *merely* that he has a privilege or servitude of taking sand and gravel, without being bound to plead that he has a common property in the said bank; and he is entitled, in support of his claim of servitude, quà proprietor of houses and tenements within the town of Hamilton, to found upon the possession of other proprietors within the town.—Stair, II. 7, 1, &c.; Ersk. II. 9, 3; Wolfe Murray, ut supra; Harvey, 8 July 1828, (3 Wilson and Shaw, 251.)

LORD WYNFORD—The respondent, who was the pursuer in an action of declarator, claimed, as proprietor and possessor, duly infeft, of the lands of Ross and Whitehill, in the parish and part of the barony and regality of Hamilton, and also as proprietor of several houses and gardens within the burgh of Hamilton, the right of taking sand and gravel from certain parts of the river Clyde, and from certain parts of the banks of that river, which the owners of houses and gardens similarly situated with those of the pursuer had. The pursuer further insisted that the ground contiguous to the sand and gravel on the western bank of the river was a common

belonging to the burgesses and inhabitants of Hamilton, who had been in the practice of using it for bleaching clothes, depasturing their cattle, and other purposes; and that for some time past the Duke had, without title, occupied that piece of common land as his own exclusive property; that the Duke had excluded the pursuer and others from access to the bank, and deprived them of the privilege of taking sand and gravel therefrom. The pursuer required to have it declared, that the pursuer and others had a right to take sand and gravel from the bank when it suited their convenience; and that the Duke should be prohibited from interrupting the pursuer and others in the exercise of their right, and be held liable to damages for having stopped the access to the bank. The defender pleaded to this summons, and the case was submitted to the Lord Ordinary, and the interlocutor pronounced by his Lordship was appealed from to the Second Division of the Court of Session, which found, 1st, That under this summons the pursuer is entitled to plead that there is no right of any kind in the defender to the land from which the pursuer claims a right for himself and others to take sand and gravel. 2dly, That in this process the pursuer is not bound to plead that he himself has any right of commonalty on the bank. 3dly, That, under the summons, the pursuer is entitled to found upon the possession of persons, proprietors and occupiers of houses similarly situated with the pursuer's houses and gardens there. This interlocutor is appealed against. It states the points for your Lordships' decision, so that it is not necessary that I should now trouble you with the interlocutor of the Lord Ordinary, or with the pleadings in the cause. Upon the first point I would observe, that if the pur-

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suer did not, by his summons, show that he had a right in the maintenance of which it was material for him to have it declared, that the defender had no right to the land from which he had excluded the pursuer, this part of the interlocutor could not be maintained. A pursuer can have no right to dispute the title of one who is in possession of lands, without showing that he either claims the land for himself, or some interest in it. To allow a title to be challenged without some opposing claim would be to encourage vexatious litigation. But the pursuer says, I have a right to take gravel and sand from a certain bank of yours; to get at it I must pass over the land that is immediately contiguous to it; and I cannot exercise my right, because you, the defender, claiming the exclusive right to that land, have prevented me from entering upon it. I, the pursuer, to whomsoever that land belongs, have a right of way over it, for the purpose of getting sand or gravel. I further say, that you, the defender, have no right to stop me, for you are not the exclusive owner of that land, but it is a piece of common land belonging to the burgesses and inhabitants of Hamilton, of whom I am one. If the noble defender brought an action against the pursuer for passing over this land, might he not justify the supposed trespass on both or either of those grounds? And if he can, he might make them the foundation of an action of declarator. He would not have been a trespasser if he was exercising a right of way, and still less so, if the person who attempted to prevent his using the way had no right to the lands over which the supposed trespasser passed, but which lands actually belonged to himself and others. The two answers are consistent, and both just and legal answers to the action. A party

choosing to have a right declared of which he is deprived before he formally declares it, may, I apprehend, have his action of declarator. I think, therefore, my Lords, there is no ground of appeal against this first branch of the interlocutor complained of. These observations are an answer to the objections made to the second branch of this interlocutor. To the third branch there are two unanswerable objections. It affirms the claim in the summons to take sand and gravel generally for any purpose. The case to which your Lordships have been referred by the learned Counsel proves that such a claim cannot be supported by the law of Scotland. I remember that whilst I held the office of Attorney General to the Duke of Cornwall certain tenants of the duchy lands took granite and slates from the quarries of the Duke, and sent them to London for sale. I proceeded against them in the Court of Chancery for an account of all the granite and slates which they had taken from the quarries and applied to any other purpose than that of employing them on the estate held of the duchy. They set up custom for the tenants of the duchy to take slates and granite from the quarries of the Duke, and dispose of them in any manner they pleased, and asked for an issue to ascertain this custom. I insisted that the custom could not have a good beginning, and was on that account illegal. The Noble Earl who for so many years presided in this House held, that the custom set up was illegal, refused the issue, and decreed that an account should be taken as prayed. Although the decisions of English courts are of no direct authority on questions of Scotch law, a concurrence of Scotch and English decisions prove that the principles on which they are founded are just. It has been insisted at the bar that

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whatever right may be granted may be prescribed for. The converse of the proposition is universally true, that whatever may be prescribed for may be granted. But a man may make a foolish grant, which will bind him and his successors; but it would not be right to presume that he had made such a grant on any evidence short of the grant itself. Lawyers often say that a right claimed by prescription is so absurd or unjust that it never could have been granted by the predecessors of him against whom it is claimed, and on that ground deny the validity of the prescription. They could not say that of a grant when produced: the instrument would repel the presumption of its non-existence. It is often not true that what may be granted may be prescribed for. We can believe that a lord who grants an estate to a vassal may grant him the means of repairing or improving that estate; he may give his vassal the right to take sand or gravel to be employed on the estate granted. There is a reasonable ground for presuming such a grant, and such a limited right of taking sand or gravel may be prescribed for. But is it possible to suppose that any man granting a house or other such property would confer on the grantee a right to take as much gravel as he pleased, and to sell it or dispose of it for any purpose but the repair or improvement of the estate granted? The tenants under such a grant might take away all the sand and gravel, and leave none for the lord or the tenantry. The decision referred to shows that such an unlimited grant is not consistent with Scotch law, and reason tells us that this decision is right. I therefore advise your Lordships to reverse the part of the interlocutor which affirms that general claim. The interlocutor further affirms that part of the sum-

mons which founds upon the possession of persons, proprietors and occupiers of houses and gardens in the town of Hamilton, similarly situated with the pursuer's houses and gardens there. The pursuer, as the owner of Ross and Whitehill, may prescribe for sand and gravel for the use of those estates; as owner of the other houses which he has in Hamilton, he may prescribe for sand and gravel for the use of them; but then he should state in right of what houses he prescribes, that the defender may know what claim he is called on to answer, the jury may know what claim they are to try, and the record may afterwards show what claim is established or disallowed. He may insist on a custom for all the owners of houses and gardens in Hamilton to take sand and gravel from the place in question; but he only claims this right as belonging to houses similarly situated with those of the pursuer; he does not specify which houses belonging to the pursuer have the character which confers this right. Do the words "similarly situated" refer to some particular part of the town in which the houses stand, or to the size of the houses, or to the number of windows that they contain, or to what? Your Lordships must perceive, that as judicial proceedings are not only to determine but to perpetuate the evidence of rights that are ascertained by the judgments of courts, the pleadings mentioned in this interlocutor do not describe the pursuer's claim with the precision that is necessary when you are putting the claims of litigant parties on the records of courts of judicature. To try this case fairly before the jury, it will be necessary to reverse the interlocutor of the Lord Ordinary, and also that of the Court, and to send this

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case back to the Court of Session, with your Lordships' direction as to the further proceedings.

The House of Lords ordered and adjudged, "That the interlocutor of the 14th day of November 1829, complained of in the said appeal, be, and the same is hereby reversed: And it is further ordered and adjudged, That the interlocutor of the 17th day of June 1830, also complained of in the said appeal, in so far as it finds that, under the summons, the pursuer is entitled, in support of the conclusions thereof, to found upon the possession of persons, proprietors and occupiers of houses and gardens in the town of Hamilton similarly situated with the pursuer's houses and gardens there, be, and the same is hereby reversed: And it is declared, That the respondent has a title only to insist in this action as one of the inhabitants of Hamilton, or as owner of certain lands therein, to the effect of having it tried by a jury whether or not he has a right of servitude to take sand and gravel from the ground in question, in right of and for the use of his own properties: And it is further ordered, That the cause be remitted back to the Court of Session, to do therein as shall be just and consistent with this judgment and declaration."

RICHARDSON and CONNELL — MONCREIFF and
WEBSTER, — Solicitors.

[6th July 1832.]

CRANSTOUN, ANDERSON, and TROTTER, W.S., trust-assignees of Sir WILLIAM FORBES and COMPANY, Appellants. — *Dr. Lushington* — *Wilson*. No. 6.

ROBERT CUNNINGHAME BONTINE Esq. of Ardoch, and WILLIAM CUNNINGHAME CUNNINGHAME GRAHAM Esq., of Gartmore and Finlaystone, Respondents. — *Lord Advocate (Jeffrey)* — *Dundas*.

Bankrupt—Statute 1696, c. 5.—Held (affirming the judgment of the Court of Session), that a disposition and assignation, and infestment taken thereon within sixty days of the bankruptcy of the granter, in implement of missives of sale executed several months previously, were not reducible under the act 1696.

WILLIAM CUNNINGHAME CUNNINGHAME GRAHAM, 1st Division.
of Gartmore, was proprietor of the entailed estate of Ld. Fullerton.
Finlaystone, in the mansion-house of which, his son,
Robert Cunninghame Bontine of Ardoch, resided, under
a lease from his father. On the 11th of March 1826,
Bontine addressed the following letter to his father:
“ I hereby make offer to you the sum of 4,240*l.* ster-
“ ling for your life-rent interest in that part of the
“ estate of Finlaystone held by me in lease from you,
“ together with the right to the game on that and the
“ other parts of the estate. My entry to be at the
“ term of Whitsunday next, and the price to bear
“ interest from and to be payable at that date. I like-
“ wise offer to purchase from you the whole growing
“ wood or timber on the lands let in lease to me, the

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“ price or value thereof to be ascertained by two arbiters
 “ mutually chosen ; and in case of their differing in
 “ opinion, by an umpire to be fixed on by them ; and
 “ for the price so to be settled, I shall grant my bond
 “ to you and your executors, payable at the first term
 “ of Whitsunday or Martinmas after your death. Upon
 “ your accepting of this offer, a regular deed of convey-
 “ ance to be granted at our mutual expence.” Graham
 accepted this offer, by a letter of the same month.

When the term of Whitsunday 1826 arrived, no payment was made by Bontine to Graham ; but Bontine alleged, that having right to the succession of the estate of Ardoch, as a substitute heir of entail, from his birth in 1799, the possession thereof was held, and the rents from that date drawn by his father, as his administrator-in-law, till he attained majority in 1820. For those rents, and also for large sums intromitted with by Graham, arising from the sales of woods and other property belonging to the son, the father had hitherto failed to render accounts ; and there depended in the Court of Session an action against him at the son’s instance, concluding for upwards of 40,000*l.* sterling. In consequence of this state of accounting, the son asserted, that it was agreed and understood between them, that when the price of the life-rent of Finlaystone fell due, it should be imputed by the son to an extinction *pro tanto* of the greater debt due him by Graham.

On the 5th August 1826, Graham executed in favour of his son a disposition and assignation, as follows :

“ I, William Cunninghame Cunninghame Graham,
 “ Esq., of Gartmore and Finlaystone, heir of entail in
 “ possession of the lands and estate of Finlaystone,

“ considering, that Robert Cunninghame Bontine, Esq.,
 “ of Ardoch, by missive letter addressed to me, dated
 “ the 11th day of March 1826, made offer to me of the
 “ sum of 4,244*l.* sterling for my life-rent interest in
 “ those parts of the estate of Finlaystone held by him
 “ in lease from me, and hereafter more particularly
 “ described, together with the right to the game on the
 “ said estate, his entry to be at the term of Whitsunday
 “ then next, now last past, and the price to bear inte-
 “ rest from and to be payable at that date; and upon
 “ my acceptance of the said offer, that a regular deed
 “ of conveyance should be granted at our mutual
 “ expence; of which offer I, the said William Cun-
 “ ninghame Cunninghame Graham, accepted, by letter
 “ addressed to the said Robert Cunninghame Bontine,
 “ dated the 20th day of March 1826: And now, seeing
 “ that the said Robert Cunninghame Bontine has ac-
 “ counted for and made payment to me of the foresaid
 “ sum of 4,244*l.* sterling, of which I hereby acknowledge
 “ receipt, and discharge the said Robert Cunninghame
 “ Bontine, his heirs, executors, and successors, for ever:
 “ Therefore I have disposed, conveyed, and made over,
 “ as I do hereby, in implement of my part of the said
 “ agreement, and with and under the declarations con-
 “ tained in the precept of sasine after inserted, dispone,
 “ assign, convey, and make over to and in favour of the
 “ said Robert Cunninghame Bontine, and his heirs and
 “ assignees whatsoever, heritably and irredeemably, all
 “ and whole,” &c.

Infestment followed on the 7th August, which was
 recorded on the 8th of that month; but on the 6th Sep-
 tember Graham was rendered bankrupt, under the act
 1696, c. 5. In the year 1824 Graham had accepted

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a bill for 5,000*l.*, drawn on him by Dunlop, W. S., which had been indorsed to and discounted by Sir William Forbes and Co., bankers in Edinburgh. Not being paid, the bankers assigned the bill and debt to Cranstoun, Anderson, and Trotter, who raised an action of reduction of the two letters above quoted, and the disposition and assignation, on the ground that the missive letter and letter of acceptance, and the disposition and assignation, were granted by Graham, at a time when in insolvent circumstances, to Bontine, his son, a conjunct and confident person, without any true, just, or necessary cause, or without a just price really paid for the same, with a view to defraud the pursuers, their cedents and authors, and his other just and lawful creditors; and such being the case, the missive letter and acceptance, and the said disposition and assignation, and sasine thereon, were null, in terms of the act of parliament 1621, c. 18; and because the missive letter and acceptance, and the disposition and assignation, were granted by Graham to Bontine in security of a former debt, with an intention to give him a partial preference, and to defraud and disappoint the pursuers, and their cedents and authors, and his other just and lawful creditors, and at a time when he was in insolvent and bankrupt circumstances, and under diligence at the instance of his other creditors, which diligence was raised and search made within sixty days after the date of the sasine following upon the said disposition and assignation, whereby the said missives, disposition, and assignation, and sasine thereon, were null and reducible, in terms of the act of parliament 1696, chapter 5; and concluding, that it should be found and declared, that Graham was, at the time

the missive letter and letter of acceptance were written, and at the time of granting the disposition and assignation, at least within sixty days after the date of the sasine following thereon, utterly insolvent and bankrupt, in terms of the statute; and it being so found and declared, the missive letter and letter of acceptance, and the disposition and assignation, and sasine thereon, and all that has followed or may follow upon the same, ought and should be reduced, &c. and declared, by decree of the Court, to have been from the beginning, to be now, and in all time coming, null and void, and of no avail, force, strength, or effect in judgment; and the missive letter and letter of acceptance, and the disposition and assignation, and sasine thereon, being so reduced and set aside, Bontine ought and should be decerned and ordained, by decree foresaid, to make payment to the pursuers, trust-assignees foresaid, of the rents, maills, and duties of the parts and portions of the lands of Finlaystone, in so far as the same have been or may be intromitted with or due by him; with expence of process.

Bontine's pleas in law, in defence, were —

1. As the sale to which the deeds under reduction refer was a bonâ fide onerous transaction, which originated at a time when Graham was to all appearance in circumstances perfectly solvent, and as the deeds were not granted without lawful, just, and necessary causes, they are not liable to reduction under the statute 1621, c. 18.

2. The statute 1696, c. 5. does not apply to cases like the present. The statute was not intended to operate as a bar to the ordinary transactions of life, and it does not annul such transactions, though entered into.

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by the bankrupt within sixty days of bankruptcy. It was not intended by the deeds under reduction to confer any preference on Bontine over Graham's other creditors, nor have they that effect. And the deeds having been granted in consequence of a transaction agreed on many months before the bankruptcy, they are in no view struck at by the statute 1696.

3. It was perfectly lawful for the parties to impute the price towards payment of a much larger sum due by Graham to the defender.

4. The defender is entitled to retain and apply whatever sum may be deemed still in his hands towards payment and extinction of the same debt.

June 23, 1829.

The record being closed, and Graham making no appearance, the Lord Ordinary reduced, decerned, and declared, in terms of the reductive conclusions of the libel, and observed in a Note— " This action is brought
" on the act 1621 and on the act 1696. The parties
" differ materially in regard to facts, which it would be
" indispensably necessary to ascertain before disposing
" separately of either of these grounds of reduction.
" If, according to the defender's statement, the granter
" of the deeds was truly indebted to the defender in
" a larger sum than the consideration for which they
" bear to be granted, it would be difficult to deny
" their onerosity; on the other hand, if the defender's
" statement in that particular be unfounded, the deeds
" could not well fall under the operation of the act
" 1696.

" But as the defender admits, in the seventh article
" of his statement of facts, that no money was actually
" paid, that the disposition and infestment were
" granted on the ' understanding ' that the price or.

“ consideration stipulated in the missives should be
 “ imputed towards the extinction of the much larger
 “ debt due by Mr. Graham, the granter, to the de-
 “ fender; and it is also admitted, that the disposition
 “ and infestment, (which last, or rather its registration,
 “ must be held to fix the date of the transaction,) were
 “ granted within sixty days of bankruptcy, it appears to
 “ the Lord Ordinary that the deeds under reduction,
 “ if not falling under the operation of the act 1621,
 “ must necessarily, and according to the admission of the
 “ defender, be struck at by the act 1696.

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“ The only point remaining to be disposed of is the
 “ conclusion for the rents.”

Bontine reclaimed to the First Division of the Court
 of Session, and their Lordships recalled the interlocutor
 of the Lord Ordinary complained of, “so far as the same
 “ reduces and decerns upon the grounds of the act of
 “ parliament 1696, and remit to Lord Moncreiff, the
 “ junior Lord Ordinary, in place of Lord Fullerton, to
 “ proceed and do further in the cause as to his Lord-
 “ ship shall seem proper; reserving all questions of
 “ expences hinc inde until the issue of the question
 “ presently in dependence.” *

Feb. 2, 1890.

Cranstoun, Anderson, and Trotter appealed.

Appellants.—The letters and disposition and assigna-
 tion under reduction, which were granted by Graham
 when insolvent, are clearly struck at by the acts 1696,
 c. 5, and 54 Geo. 3, cap. 137, sec. 12. The spirit as
 well as the letter of these statutes apply to this convey-
 anee, which constituted an illegal preference in the

* § Shaw and Dunlop, 425.

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respondent's favour, who, according to his own statement, gave no present value for the conveyance; but though merely a prior creditor of his father at the date of the transaction under challenge, was from that period enabled to plead, upon his claim of debt, a set-off or compensation to the amount of the purchase-money of the subjects conveyed to him.

These deeds were not followed by seisin till the day Graham absconded, and within a month of his legal bankruptcy; but all deeds challenged under these statutes must be held to be of the date of the registration of the sasine. The application of the statutes is the more undoubted, as, from the admitted circumstances of the case, the agreement between the parties must have been entered into with no other intention at the time than to create an undue and partial preference over other creditors.

Although there had been no express and positive agreement in contemplation of bankruptcy, by which the respondent was to have right so to apply the price of his purchase as to secure a preference over his father's other creditors, the missive letter and subsequent deeds would be still objectionable on the act 1696, c. 5; and this totally independent of any actual fraud or corrupt intention. Under this statute it is sufficient to annul a conveyance or other deed granted within sixty days of the registered sasine, that, in effect, as in the case of the transaction under challenge, it operates as a preference, and enables the creditor, from the period of its execution, to provide for the payment of his debt.

Even if the minute of agreement had constituted a proper sale for a price paid by the respondent to Graham, the statutes 1696, c. 5, and 54 Geo. 3, c. 137,

would have still prevented the execution of that agreement, by the act or interposition of the bankrupt in August following, when, after an interval of nearly five months, he voluntarily granted the disposition on which sasine was taken in favour of his son; for the respondent, by paying the price of his purchase from Graham, would have become a mere personal creditor for fulfilment of the obligation to grant a conveyance; and after bankruptcy, actual or constructive, a debtor is not entitled to interpose at all in granting any voluntary deed, such as a disposition or other conveyance, which may operate to the advantage of a particular creditor over the creditors at large. — 2 Bell, p. 130, 210, 214; Spier, 22 May 1826, (2 W. & S. p. 253); Blaikie, 9 March 1781, (Mor. 887); 2 Bell, p. 219; M'Math, 1 March 1791, (2 Bell, p. 213); Dunbar's Creditors, 13 June 1793, (Mor. 1,027); Eccles, 4 Feb. 1729, (Mor. 1,128); Trustees of Brough, and other cases, in 2 Bell, p. 225.

Respondent. — The act 1696, cap. 5, (and which was assumed as the sole ground by the Lord Ordinary,) has no application to such a case as the present. The object of that act is to cut down voluntary deeds granted by parties bankrupt and insolvent, after bankruptcy, or within sixty days before, for satisfaction or further security of debts then subsisting, such as may operate a preference to the grantee, in prejudice of the grantor's other creditors.

As to the original lease, it has not been challenged by the appellants, the transaction not falling within the period of the statutory prohibition. But neither does the transaction for the purchase of the life-rent

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interest come within the statutory period. Before the statutory period of sixty days commenced, there was a free interval of more than three months, during which Graham was at perfect liberty to sell, and the respondent or any one else at liberty to purchase from him, exactly in the same manner as if there had been no subsequent bankruptcy, but that he had continued a solvent man to the present hour. Even although the date of the purchase were brought down to the date when the price was payable, and the amount thereof imputed, the transaction would still be equally unchallengeable.

Then how can the disposition and conveyance of the life-rent interest be struck at by the statute? It is impossible to bring that deed under the statutory description of a "voluntary" disposition, granted either for satisfaction or further security of a debt, in preference to other creditors. It was a deed necessarily granted by Graham, to the granting of which he was in law compellable at the respondent's instance, as being merely in implement of the purchase which had been previously concluded. Subsequently to the period of payment, Graham's debt to the respondent was wiped off to the extent of the agreed price of the life-rent. The respondent could not, at any subsequent period, shake himself free of the purchase, had he been ever so desirous; nor could he maintain a claim of debt against Graham to the full amount of his intromissions, but only to that amount minus the agreed purchase money.

But if such was the respondent's situation, it is not less obvious that Graham was brought under a direct obligation to grant a conveyance of the subject for which the price was payable. This was an obliga-

tion of a different nature, and calculated to produce a different effect from that which he lay under in regard to his intromissions. It was not an obligation to pay a sum of money, but an obligation to execute a deed for the effectual transfer of an heritable subject, in consideration of a price actually paid, in respect the money was previously in his own hands, ready to be imputed when the term of payment arrived. And thus, if the obligation to convey is to be called a debt, which no doubt it may, as giving rise to a corresponding claim at the respondent's instance, it is a novum debitum, which, in the interpretation of the act 1696, has been repeatedly adjudged not to fall under that statute.

It is quite unnecessary to go into any inquiry as to the debt due by Graham to the respondent. In the meantime the respondent is entitled to retain the price he agreed to pay for the life-rent; and whenever the amount of the debt due to him is precisely fixed, compensation takes place, the legal effect of which draws back to the date of the concurrence debiti et crediti, and consequently operates virtual payment, as if the respondent had paid down the price.—Johnstone, 29 Jan. 1751, (*Elchies v. Bankrupt*, No. 27); *Mansfield & Co.*, 15 Feb. 1771, (F. C.); *Mitchell*, 12 Nov. 1799, (F. C.); *Bank of Scotland*, 7 Feb. 1811, (F. C.); *Cormack*, 8 July 1829, (7 S. & D. p. 868); *Kames's Dictionary*, vol. I. p. 165; *Bankton*, B. I. t. 24, § 27; and *Erskine*, B. III. t. 4, § 12, 20.

LORD WYNFORD.—My Lords, this is an action of reduction and improbation, that is, an application to the Court in Scotland to vacate and set aside certain written instruments, namely, “An offer or missive letter, dated

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the 11th day of March 1826, written by Robert Cunninghamhame Bontine, to William Cunninghamhame Graham, his father, whereby the said Robert Cunninghamhame Bontine made offer to the said William Cunninghamhame Graham of the sum of 4,244*l.* sterling, for his life-rent interest in that part of the estate of Finlaystone held by him in lease from his father, together with the right to the game on that and the other parts of the estate ;” the answer to that letter, accepting the offer, dated the 20th of March 1826 ; the disposition and assignation made in consequence of these letters, of date the 5th of August 1826 ; and the instrument of sasine, for the purpose of carrying the same into execution, dated the 7th of August 1826. The assignment was made, and sasine executed within sixty days of Graham’s bankruptcy, but the two letters (which if Graham was the debtor of Bontine to the amount of the sum stated in them to be the consideration of making the assignment bind him to make trust-assignment) were written long before his bankruptcy and when he had the complete *jus disponendi* of his property. Bontine, the respondent, is the son of Graham. Graham had been the guardian of Bontine during his infancy, and had received, in the character of guardian, the income of his estates,—Bontine attained his majority in 1820. It is said that Graham received of Bontine’s property, during his minority, the sum of 40,000*l.* Whatever the sum was, that remains still a debt. The amount of this sum is disputed, but that is a matter with which, it appears to me, your Lordships have nothing to do now, but which may be extremely material, according as your Lordships decide one way or the other, in another stage of the cause. In the year 1826 Bontine

applied to his father to sell the life-rent of his estate. The letter of Bontine offered the sum of 4,244*l.* to be paid at the Whitsunday then following for the life-rent; and that offer is accepted by the letter of Graham. The estate, therefore, appears to be conveyed in consideration of a sum of 4,244*l.*, to be paid at Whitsunday. No such sum was ever paid; because the true character of the transaction was, that instead of the payment of 4,244*l.*, that sum was to be taken off from the supposed previous existing debt from Graham to Bontine. My Lords, on this case coming before the Lord Ordinary, he decided that it was not sufficiently made out that there was no consideration for this assignment, and that therefore the instrument was not affected by the Scotch statute of 1621, which is the statute relative to bankrupts, that voids all conveyances which are made without consideration; but his Lordship was of opinion, that the two last of these instruments, the assignment and the sasine, being within sixty days of the bankruptcy, and not being, as his Lordship considered, for a present debt, they were struck at (to use the words which appear to be familiar to the learned Judges of the Court of Session) by the statute of 1696. A majority of the Court of Session held that the assignment and sasine were not struck at by the statute of 1696, and reversed the interlocutor of the Lord Ordinary. The question for your Lordships decision will be, whether the assignment and sasine are within the statute of 1696? It will be material to call your Lordships' attention to the words of this statute. It is enacted, "That for hereafter, "if any debtor under diligence by horning and caption, "at the instance of his creditor, be either imprisoned or "retire to the Abbey, or any other privileged place, or

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“ flee or abscond for his personal security, or defend
 “ his person by force, and be afterwards found by
 “ sentence of the Lords of the Session to be insol-
 “ vent, shall be holden and repute on these three
 “ joint grounds, viz. diligence by horning, and caption,
 “ and insolvency, joined with one or other of the
 “ said alternatives of imprisonment, or retiring, or
 “ flying, or absconding, or forcible defending, to be a
 “ notour bankrupt, and from the time of his foresaid
 “ imprisonment, retiring, flying, absconding, or forcible
 “ defending, which being found by the sentence of the
 “ Lords of Session, at the instance of any of his just
 “ creditors, who are hereby empowered to raise and
 “ prosecute a declarator of bankrupt thereanent, His
 “ Majesty, with consent of the Estates of Parliament,
 “ declares all and whatsoever voluntary dispositions,
 “ assignations, or other deeds, which shall be found to
 “ be made and granted, directly or indirectly, by the
 “ foresaid dyvour or bankrupt, either at or after his be-
 “ coming bankrupt, or in the space of sixty days of before,
 “ in favours of his creditors, either for his satisfaction or
 “ further security, in preference to other creditors, to be
 “ void and null.” I have stated to your Lordships, that
 the instrument of assignation and the deed of sasine,
 were made within sixty days of Graham’s bankruptcy.
 My Lords, I have no hesitation in saying, that but for
 the previous instruments, of the 11th and 20th of
 March — there being no novum debitum, as it is called
 in the Scotch law, to support these deeds — these would
 be struck at by this statute ; but the question is, Whe-
 ther the two letters executed in the month of March do
 not prevent the statute of 1696 attaching upon the as-
 signation and sasine ? Assisted by the excellent argu-

ment your Lordships heard at our Bar, I have looked into all the cases, and I can find no one which appears to me to give your Lordships much assistance in the decision of the question before us. I beg your Lordships to observe, that the statute does not declare all deeds to be void and null that are made within the time specified, but only "voluntary" deeds. But you cannot say that a deed is voluntary which a party is bound to execute, and which the law will compel him to execute. A voluntary deed is one which the party is at liberty to execute or not as he pleases. In the month of March, when the letters were written, Graham was free to assign his life-rent for a past or present consideration. He then for a past consideration, which we must assume to be a just one, bound himself by his letter to assign it to Bontine. A Court of equity would have obliged him to make that assignment, and no change in the state of his property by bankruptcy, or otherwise, could excuse him or those who derive under him, as the assignees of his estate, from completing that assignment. If he had conveyed it away to a person, without any consideration, undoubtedly that transaction would have been vacated by the statute of 1621. But the Lord Ordinary held the transaction not to be within that statute. We must assume, therefore, that there was a debt due from Graham to Bontine at the time when the letters were written. Graham had the power of paying any legal just creditor; and your Lordships, deciding this question upon the true construction of the statute of 1696, must consider that Bontine was in the month of March a just and true creditor. It is not true that the money was to be paid at Whitsunday as the letter states; and that may be material when a question

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shall arise as to the genuineness of the transaction. But that is not the question we are now deciding; that question will be referred to the Court of Session, who will inquire into the bonâ fides of the transaction. But considering this case, with reference to the question on the interlocutor of the Court setting aside that part of the judgment of the Lord Ordinary which says the deed is struck at by the statute of 1696, we must assume that it was an assignment of this property for the purpose of discharging a bonâ fide debt. Then, viewing it as a fair transaction, and that the debt gave to the party with whom that contract was made a private right, which private right he might enforce, then I submit to your Lordships, that it is impossible to consider that the deeds which passed within the sixty days could be voluntary deeds. By the statute of 1696, all deeds executed within sixty days of a bankruptcy are to be set aside; but the Scotch Courts have for a long time very properly decided, that if within the sixty days a man pays full valuable consideration, and takes an assignment of property, the assignment not being made for the purpose of securing or paying a creditor, such assignment is not struck at by the statute. The statute does not apply to nova debita. By such transactions the creditors are not injured. If they have not the estate conveyed, they have an equivalent in having the prices paid for it. Therefore the Court say, taking all these circumstances into consideration, though the instrument may be within sixty days, it is not within the spirit of the statute, for that is to protect the property for the benefit of the creditors, and it is fairly and justly protected. The object of the act was to prevent the bankrupt's estate being disposed of to

favourite creditors to the prejudice of others ; and the courts have held if a transaction did not tend to divert property from the general creditor to some favoured creditor, although it might be within the letter, it was not within the spirit of the statute, and therefore not to be affected by it. In remedial laws it is the spirit and intention of the legislature, and not the letter of the acts by which courts are to be guided. *Spier v. Dunlop*, decided in this House, has been referred to ; and I should have recommended your Lordships to have given judgment yesterday, but that I was anxious to look farther into that case before I advised your Lordships to come to a decision, which it was supposed might interfere with what had already been decided by your Lordships. I have carefully read that case, and it does not appear to me that it bears in the slightest degree upon the present. That was a case between an uncle and a nephew. The nephew indorsed a bill, which the uncle, who was afterwards a bankrupt, accepted. The nephew, suspecting the uncle to be in doubtful circumstances, and likely to fall into bankruptcy, prevailed upon him, within sixty days, to give an assignment of certain property. For what reason ? To secure him, the nephew, against the consequences of his indorsement ; for your Lordships know that the consequence of indorsement is, that although the acceptor is first liable, yet, if he does not pay, the holder has a right to recover the amount from the indorser. If I had had the honour of a seat in your Lordships' House at the time that case was decided, I should have acquiesced in the decision pronounced, that that was a case directly within the statute. They considered that a fraud upon the law, and therefore held it to fall within the meaning of the provisions of the

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statute. But your Lordships see, that in that case the nephew, the indorser of the bill, had not, before sixty days, whilst his uncle had the power of disposing of his property, any obligation from the acceptor binding him to make any such assignment to secure him against the consequences of the indorsement. That circumstance distinguishes that case from the present. In Spier's case the assignation was purely voluntary, for there was no previous engagement binding upon the uncle; but in the present the assignation was not purely voluntary, but on fulfilment of a previous legal contract. I have only to repeat, that all that the judgment appealed from declares is, that this transaction is not within the statute 1696; and being of opinion that that judgment is right, I therefore shall humbly move your Lordships, that the judgment of the Court below be affirmed. But, my Lords, there is another question, namely, the question of costs. There is a general rule, that when an appeal is dismissed, the party appealing should pay the costs. But, my Lords, the appellant, as it appears to me, was drawn here, by the Lord Ordinary having decided in his favour, and two of the learned judges in the Inner House having supported that judgment. He was, in coming here, asking your Lordships whether the three judges or the two judges were right. I am extremely sorry that it so frequently happens that the learned judges of the Court of Session do not confer a little more together before they pronounce final judgment. This might lead some of them to surrender first impressions. I know the English judges are in the habit of conferring together, and without giving up the independence of their judgment, they see reason, on such conference, to abandon first impressions; and this, in many cases, prevents

further litigation between the parties. Under these circumstances, I shall not recommend to your Lordships to give costs. I move your Lordships, therefore, merely that the appeal be dismissed.

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The House of Lords ordered and adjudged, "That the
" appeal be dismissed, and the interlocutor therein com-
" plained of be, and the same is hereby affirmed."

CALDWELL and SON — RICHARDSON and CONNELL, —
Solicitors.

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No. 7. Duke of ARGYLL and Trustee, Appellants. —
Dr. Lushington — Tinney.

ALEXANDER MACALISTER Esq. of Loup, and Factor
 loco tutoris, Respondents. — *Lord Advocate (Jeffrey)*
 — *Follett.*

Thirlage.—Circumstances under which, in the absence of any written title, a claim to thirlage, founded on prescriptive possession, was (affirming the judgment of the Court of Session) sustained. Circumstances under which the lightest thirlage, consistent with the facts of the case, was (reversing the judgment of the Court of Session) held to be constituted.

2d Division. THE family of Argyll having acquired the lands of
 Lord Mackenzie. Kilarue, Tangietavil, &c., including the mill of Tangie, cum molendinis et multuris, by progress from the church, the Duke of Argyll, in the year 1741, disposed to M'Millan of Drumore "totas et integras terras de Kilarue, Tangietavil," &c. "cum molendino de Tangie, " cum omnibus multuris sequelis lie knaveship et lie thirlage ejusdem," &c. M'Millan, in 1767, conveyed the lands and mill, "with all and sundry multures, sequels, knaveship, and thirlage of the same," to Campbell of Barbreck, who thereupon obtained a charter of resignation from the Duke of Argyll's commissioners, in which the right to the multures and mill-services was repeated. These titles came by progress into the person of Alexander Macalister.

It was alleged that during the period when the mill of Tangie was possessed by the Argyll family, and even prior to that time, the lands of Backs, and many other farms belonging to the Duke, were thirled to this mill, in so far as the tenants had immemorially used to carry their whole growing corn to the same, and to pay intown multures; but there was no special astringency to the mill of Tangie in the Duke's titles to these farms, which had been held in feu by the Argyll family since the year 1576, "cum molendino et multuris," and for a certain feu-duty, "pro omni alio onere," &c.

In support of this claim, Macalister and his factor loco tutoris raised an action of declarator against the Duke of Argyll, setting forth that the pursuer was heritably infeft, inter alia, in all and whole the lands of Ballivean, Drumnalia, Tangietavil, &c. &c. in the lordship of Kintyre, sheriffdom of Argyll, with the mill of Tangie, with all multures, sequels, knaveships, and thirlage thereof, with houses, biggings, &c., conform to instrument of sasine in his favour dated the 8th, and registered at Edinburgh the 25th days of August 1826; in virtue whereof he had good and undoubted right to the multures, sucken, and sequels in use to be paid to the mill of Tangie; that the lands of Backs, Aros, Lachnalarach, Skerobline, &c., belonging in property to his Grace George William Campbell Duke of Argyll, (the summons then enumerated other lands belonging to other parties,) were thirled and astringed to the mill of Tangie; and the defenders, their predecessors and tenants, had been in the immemorial use of bringing their whole growing corn (seed and horse corn excepted) to the said mill, and of paying the intown multures and bannock meal therefore, conform to use and

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wont; that the whole defenders above named, and their tenants in the said lands by their orders, had of late wrongously abstracted and withheld from the said mill the corns growing on their respective lands, whereby the pursuer, as proprietor of the said mill, was deprived of the benefit of said thirlage; and concluding that it ought to be found and declared, that the said lands, with the whole corns growing thereon (seed and horse corn excepted), are astricted and thirled to the aforesaid mill of Tangie, for payment to the pursuer, his heirs and successors, or to his or their tenants in the said mill, of the astricted multures, sucken and sequels, intown multure and bannock meal, knaveship, lock or gowpen, and water-barley, and that the pursuer and his foresaids had good and undoubted right to the said multures, sucken and sequels, intown multure and bannock meal, knaveship, lock or gowpen, and water-barley, now and in all time coming.

The Duke and his trustee stated a preliminary plea in defence against the relevancy of Macalister's title, and claimed to be assoilzied without going into a proof;
 7th July, 1829. but the Lord Ordinary, having advised Cases, found
 “ that there does not appear to be sufficient ground for
 “ deciding the cause in favour of the defenders hoc
 “ statu; and therefore appoints the cause to be enrolled,
 “ with a view to an order for proof or remit to the Jury
 “ Court.”

This interlocutor was acquiesced in, and thereafter a proof taken on commission, upon the import of which his Lordship again ordered Cases.

The proof was held to establish —

1. That the possessors of all the farms libelled (with the exception of two farms, to which the proof did not

apply) had been in constant use to attend the mill of Tangie with all their corns, seed and horse corn excepted, and to pay the intown multures, down to about the year 1810, from a period as far back as seventy or eighty years before the date of the action.

2. That mill-services, such as carrying mill-stones, were occasionally performed during that period by these farms to the mill of Tangie.

3. That there were other mills of a lower rate of mul-ture, which some of the tenants passed in going to the mill of Tangie; and Colonel Porter, one of the witnesses, deponed, “ that Donald Bowie in Backs complained “ of the hardship of being bound to the inconvenient “ mill of Tangie, when Campbeltown mill was quite at “ hand.”

4. That in the tacks of some of these farms, the Duke of Argyll bound his tenants to pay a certain “ quantity of multure meal ” to himself, and to carry their corn “ to any mill to which the farms are or shall be thirled,” and to pay “ the accustomed multures,” &c. No thirlage to any other mill was proved; and it also appeared that some of the tenants had been summoned in processes for abstracted multures by the previous proprietor and tenants of the mill of Tangie, in which decree had not been pronounced, nor the Duke called as a party, the tenants having settled matters by paying for the abstractions.

The Duke led no proof to contradict the above; but an argument was founded on the leases granted by his Grace, in which he took the tenants bound to pay mul-ture to himself. It was also maintained, that the clause binding the tenants to take their corns to the mill, “ to which they are or shall be astricted,” and to pay “ the

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accustomed multure," inferred astringion, or a reserved power of astringion to some other mill belonging to the Duke, and not to the mill of Tangie; and it was further contended, that as there was no proof of the tenants having ever paid multure for grain sold out of the thirl, the only thirlage that in any event could be held to be established was of grana mollibilia.

But his Grace chiefly maintained —

1. That the terms of his titles to these farms contradicted the claim of thirlage; for not only did they contain no special astringion to the mill of Tangie, but the conveyance being cum molendinis et multuris, with a special feu-duty, bearing to be "pro omni alio onere," any thirlage previously constituted was thereby discharged; and,

2. That the claim of thirlage being founded neither upon any decree against the Duke, nor upon a special astringion to that mill in any of the titles produced, there was no basis whereon to establish such servitude by prescription.

8th March 1833. The Lord Ordinary, "in respect to all the lands libelled belonging to the Duke of Argyll, excepting Lachnalarach, and Skeroblin, finds, decerns, and declares in terms of the libel; but in respect to the said lands of Lachnalarach and Skeroblin, sustains the defences, and assoilzies the defender his Grace the Duke of Argyll, and decerns;" and found the defender liable to the pursuer in expences, so far as related to the action against him, subject to modification.

"*Note.*—The Lord Ordinary thinks the chief grounds of thirlage established are, (1.) That the mill of Tangie is held by titles derived from the Duke, with multures, &c. (2.) That there is sufficient evidence

“ that these lands have paid heavy intown multures
 “ from time immemorial down to 1809 or 1810, and
 “ also performed mill-services, and occasionally paid
 “ for abstractions, there being no evidence at all to
 “ contradict that of the pursuer; from which the Lord
 “ Ordinary thinks it must be inferred, that the lands
 “ stood so astricted at the time the Duke conveyed the
 “ mill, with multures, &c. (3.) That in the tacks of
 “ many of the lands at least the Duke seems to have
 “ been in the practice of taking the tenants bound to
 “ carry their grain to any mill to which the farms are
 “ or shall be thirled, and to pay the accustomed mul-
 “ tures; which proves that there had been a thirlage,
 “ and none is shown to have existed to any other mill.
 “ The stipulation of dry multure to the Duke himself
 “ seems of no moment, for that is over the proper
 “ thirlage mentioned in these tacks in any view of it,
 “ and plainly was just part of the rent, independent of
 “ any mill. The astriction of certain lands in the
 “ charter of the mill seems equally unimportant, as
 “ these very lands are conveyed with the mill, and
 “ never could be the whole thirl. This clause must
 “ have been to prevent the tenants pretending the
 “ extinction of the thirlage quoad confusionem.”

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The Duke reclaimed to the Court, but the Lords 17th June 1831.
 adhered to the interlocutor submitted to review, refused
 the desire of the reclaiming note, and decerned and
 found additional expences due; it being understood that
 “ Skeroblin” comprehends only “ Skeroblinraid;”—and
 remitted the case quoad ultra to the Lord Ordinary, to
 proceed therein as to him should seem just.*

* 9 Shaw and Dun., 410.

No. 7. Thereafter, the Lord Ordinary, of consent, found, decerned, and declared, in terms of the libel, against the other defenders; approved of the auditor's report as to the expences against the Duke of Argyll and his trustee; modified expences to the sum of 316*l.* 0*s.* 8*d.*, and decerned for the same, together with the expence of extract.

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The Duke and trustee appealed.

6th July 1832. *Appellants*.—It sufficiently appears from the evidence that the pursuer has no written title to any servitude of thirlage on the lands in question, and that the parole proof is inadequate to prove a prescriptive right. The Duke, therefore, should have been absolved in toto.

But, separatim, in any view the interlocutors complained of are erroneous, in so far as they find that the whole growing grain on the farms mentioned in the summons is subject to the thirlage.

This is quite manifest from the clear and recognised distinctions which exist between the different species of thirlage known in the law of Scotland.

The slightest degree of this servitude or restriction is that of *grana molibilia* or grindable grain, under which the party liable in the servitude to this extent is not bound to pay multure to the mill of the thirlage for all the grain growing upon his lands, but only for such portion of it as he has occasion to grind.

The second and higher degree of restriction is that of *grana crescentia*, under which all grain growing on the lands, whether requiring to be ground or not, is liable in payment of multures.

A third and still higher degree of the thirlage is that of *invecta et illata*, under which the tenant must not

only pay for the grain growing on his lands, but for any other grain which he may purchase and bring within the thirl. These different degrees of thirlage are perfectly distinct.

In all cases where the question is, to which of them the servient farm is to be subjected, even where there is a title in writing to thirlage, the presumption is in favour of the lightest. So that, even where a party has a written title to the thirlage of certain lands, unless the usage following on the title has explained its meaning into a servitude of *invecta et illata*, or of *grana crescentia*, the servitude will be held to be merely one of grindable grains.

Still more is this the case where there is no written title to the thirlage of any particular lands, and where the thirlage is attempted to be made out merely by prescriptive possession. In such a case the rule must be rigorously applied, *tantum prescriptum quantum possessum*. The fact, that tenants have been in use for forty years to pay multures for grain ground at the mill, or even to pay abstracted multures for grain ground at another mill, proves at the best nothing more than a servitude of thirlage on the *grana molibilia*. No inference can be drawn from this with regard to the existence of any servitude of *grana crescentia*. To establish that, it must be shown that for forty years the tenant has been accustomed to pay multures for grain growing on the lands, but neither ground at the mill of the thirl, nor at any other mill.

In any view, therefore, the only thirlage to which the lands are liable is that of grinding at the mill of Tangie all such grain as the tenants require to grind; but they are not liable to the thirlage of all growing

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Respondents.—The writs founded on by the respondents, and the possession and usage had thereon, constitute a valid and effectual right and title in the pursuers to the mill of Tangie, with the multures, sequels, knaveship, and services thereto belonging, and are sufficient to warrant the conclusion of thirlage libelled in relation to the lands in question.

The evidence adduced by the respondents sufficiently instructs their averments and the conclusions of the libel, especially in the absence of any contrary evidence.

The judgments complained of are well founded in law and equity, and expences followed as a matter of course. 2 Ersk. 9. 21. 28. 29; 2 Stair, 7. 16; Elchies, voce Multures, No. 4.

Lord Wynford.—My Lords, this is an action which has been instituted by Alexander Macalister against his Grace the Duke of Argyll and his trustee. In this action the pursuer claims thirlage on all corn grown within a certain district, —seed and horse corn excepted. This service of thirlage is known in England. There are certain mills called soke mills, the owners of which have by custom a right to bring all the corn grown within the manor to be ground at their respective mills. Three descriptions of thirlage are recognized in the law of Scotland. The largest description of thirlage

where the lord of the district, the person who has this right, claims certain dues on all corn brought within his district, wherever brought from; and is called thirlage on grana invecta et illata. This thirlage is not claimed in the suit now before your lordships. Another thirlage is upon grana crescentia,—that is, dues upon all the corn which is grown in the district, whether it be grindable corn or not,—that is, the claim in the present action. The third right of thirlage is for corn which is ground within the manor. This last thirlage has always appeared to me to be very reasonable, and I see very good foundation for the custom on which it depends. In ancient times none but the lord had means sufficient to build a mill upon the land, and it was natural enough for him to say, I will not erect this mill unless you agree to bring to be ground at it all the corn which you have occasion to grind; and it was equally natural for the tenant to enter into an agreement, founded on obvious mutual convenience, that if the lord would build a mill he would bring all such corn as he should grind to that mill. Up to that extent the right of thirlage is reasonable; but I confess I never could see any ground for carrying thirlage beyond that extent; and therefore I will never advise your Lordships to sustain a higher thirlage than on grindable corn, except where the right to such higher thirlage is proved by the clearest evidence. I am glad that my opinion in this case agrees with the learned writer on the law of Scotland who has been quoted to your Lordships. He says that you are not, when thirlage is proved, to presume the largest thirlage, but ought to confine it to the smallest, unless the evidence carries it to higher; and then you are to go no further than to

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give that species of thirlage which is clearly made out. My Lords, two questions have been raised in this case. First, whether any thirlage be due; secondly, whether, if any be due, it is due for all corn grown in their own district, except seed and horse corn, or only for corn ground within the district. The defender (the appellant) says, you are entitled to no thirlage at all, because a right of this description cannot be supported by parol testimony only, you must have some written evidence to support it; to which the respondent replies, I admit that in cases in general that is true, but I insist that as this land formerly belonged to the church, thirlage may be proved by parol testimony. I insist further that my parol testimony is supported by a written document. Now, although by the general rule of the law of Scotland thirlage must be made out by written evidence, there is an exception to that general rule in favour of the claim of thirlage over lands where the mill had belonged to the church. (There is also one as to lands belonging to the Crown.) In the Institutes of Erskine, one of the ablest works on Scotch law, this exception is said to have been made, in consequence of the destruction of the titles and muniments of the church at the Reformation; I at first thought, that the exception should be confined to lands now belonging to the church, but the reason given for the exception proves that it ought to apply to lands that did belong to the church formerly, although they are now lay lands. It has been proved that this mill was once church property, and therefore parol evidence is sufficient to prove the rights appertaining to it. Now, my Lords, that some thirlage is due, there is, in my opinion, abundant evidence. Many witnesses have been examined who speak of the payment of thirlage; and

there is no testimony affecting their evidence. It was objected that this was not carried back far enough, for by the law of Scotland the prescription requires a proof for forty years. But these witnesses, in my opinion, do carry it back forty years. One of the witnesses, who is eighty years of age, speaks of having known thirlage paid since he was twenty years of age; that is 60 years. Another witness, who is also of the age of eighty, speaks of having known it paid considerably more than fifty years. In addition to this, there is a paper put in,—viz. a list of the dues payable to this mill,—which is proved to be in the handwriting of a clergyman, who was the factor, who transacted the business of this estate; and he, in that paper, carries back the testimony with respect to thirlage that was due to this mill certainly for a much longer period than forty years. But they have a written title, for the Duke of Argyll, in 1741, made a grant of this mill, with all the thirlage thereunto belonging; and they say, that is a written title sufficient, if they show the lands at that time paid thirlage; and they have adduced witnesses who have proved that those lands paid multures as long as they can recollect, although these witnesses cannot carry their evidence back to 1741. If they prove that it has been paid during all their time, and there is no evidence to show that there was any period when it was not paid, that raises a presumption that it was paid in 1741, and that this multure was a multure referred to in 1741, and that is the ground upon which the Judges below decided this case. My Lords, I therefore think it is clearly made out that these lands were liable to some thirlage to this mill; and that brings me to the other question, what thirlage were they liable in? Was

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the thirlage on grana crescentia, or only on grindable corn? I have already stated to your Lordships, that, in my humble judgment,—and I am borne out by the authority of Erskine in that respect, and by a judgment of this House since I have had the honour of sitting here,—your Lordships should not extend it to the larger claim of thirlage, unless that larger claim be made out by evidence so clear and satisfactory that it can leave no doubt on your Lordships' minds. What good reason there could be for the origin of the custom, that a man should be obliged to pay for grinding corn which he never means to grind, but to sell in its entire state for exportation, to be used for purposes that may not require grinding, in other places out of the district, I never could see. Now the question is, then, is the higher thirlage made out? for I admit that the higher thirlage is sanctioned by the law of Scotland; and, therefore, if it is clearly and satisfactorily made out, your Lordships will affirm the judgment entirely. But I cannot state to your Lordships that I think it is clearly and satisfactorily made out. I have looked at all the evidence with the utmost attention. One witness unquestionably does state that the custom was to pay for corn that grew within the district; but he mentions no instance of any claim of thirlage being insisted upon, except when the owners of the corn had passed the mill by, and carried their corn to be ground at some other mill; this neutralizes his evidence. But would your Lordships support such an odious claim? for thirlage is an odious claim when it goes beyond grindable corn. On the testimony of one witness the fact must have been notorious through the district, and if true might have been proved by many witnesses. We cannot say that a fact is

satisfactorily proved, which must, if it exists, be known to many, and is only spoken to by one witness. The respondents have not been able to extract any proof in support of this evidence from any other witness who has been examined in the cause. There is an old document referred to, namely, the account given by the clergyman of those lands which paid thirlage. I have looked at that account, and it merely states that they are to pay thirlage, but not what kind of thirlage they are to pay. I think there is evidence in the cause, which weighs much stronger than the evidence of one witness giving an opinion without stating any fact to support it; and that is, the claim made in 1790. It is a mistake to hold that it was a claim for grana crescentia. The claim is made for grana crescentia, or "at least,"—that is the form of the summons,—“or at least grindable corn.” Now, my Lords, certainly where such words as these have been inserted, “or at least grindable corn,” where the claimant does not absolutely insist on grana crescentia, but lets himself down by tendering “at least grindable corn,” your Lordships will take his lowest estimate of his claim. But, my Lords, I do not stop at the summons. You must look at the answers that are put in by the different tenants. If they had, in the year 1790, admitted thirlage for grana crescentia, I should humbly have moved your Lordships to have held, that there was sufficient evidence of thirlage for grana crescentia; but that is not so. The tenants admit that the lands are bound to pay a thirlage for grindable corn, and confine it expressly to grindable corn. Now, my Lords, if they confined it to the grindable corn in 1790, will your Lordships extend it beyond that now, particularly seeing that the persons who claimed thirlage

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at that time did not insist upon the thirlage of grana crescentia, but upon the thirlage of grana crescentia, "or at least grindable corn." I cannot therefore but think that the balance of evidence in this case is strongly in favour of the lower rate of thirlage. My Lords, it is important to observe, that the Lord Ordinary in his interlocutor, confirmed by the Court above, does not touch the question of the precise kind of thirlage, but merely allows some thirlage, without saying whether it is thirlage of the one kind or of the other kind; and the learned Judges in the Court above were not called on to decide that the thirlage was granted for grana crescentia, but that there was a thirlage. The Court have, however, by granting the whole conclusions of the libel, which includes grana crescentia, imposed that heavy thirlage. I suspect this point was not raised in the Court below; because, if it had been made, I should suppose that the learned Judges would have given some judgment upon it, which they have not done. I therefore humbly submit to your Lordships, that this appeal should be allowed, because, as I have stated, this summons claims a right which, if your Lordships allow this judgment to stand, imposes the thirlage upon grana crescentia. I move your Lordships therefore, for the purpose of preventing that right being established, to allow the appeal, with a direction that the owner of this mill, the respondent in this case, is entitled to thirlage upon grindable corn only. My Lords, with respect to the costs, I should submit to your Lordships, that there should be no costs in this case, because part of the appeal is allowed, and therefore it is not usual to give costs; and as the decree in the Court below was with costs, and as your Lordships

cannot, I think, sustain the whole judgment, but will be of opinion that so much of it as sustains a thirlage for grana crescentia should be reversed, I would move your Lordships, that so much of the judgment of the Court below as gave costs against the appellant be reversed.

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The House of Lords declared, " That the thirlage in question in this cause was due for grindable corns only ; and " it is ordered and adjudged, that the several interlocutors " complained of in the said appeal, in so far as the same are " inconsistent with this declaration, be and the same are " hereby reversed ; and it is further ordered and adjudged, " that the several interlocutors complained of in the said " appeal, in so far as they give expences to the respondents " in this cause, be and the same are hereby also reversed ; " and it is further ordered, that the cause be remitted back " to the Court of Session in Scotland, to proceed further " therein as shall be consistent with this judgment, and " as shall be just."

SPOTTISWOODE and ROBERTSON — RICHARDSON and
CONNELL, — Solicitors.

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No. 8. JOHN REID, Appellant. — *Lord Advocate (Jeffrey).*
Dr. Lushington.

PETER LYON, Respondent. — *Knight—Russell.*

Trust.—Circumstances under which an assignation of a lease ex facie absolute was held (affirming the judgment of the Court of Session) to have been granted in security only, and to be redeemable by the heir of the assignor, on repaying to the assignee the advances made by him in relation to the lease.

1st Division. In April 1798 Peter Lyon, druggist in Edinburgh,
Ld. Corehouse. entered into a contract of lease with Sir James Montgomery of Stanhope, whereby Sir James let to Lyon, his heirs, assignees, and sub-tenants, the lands of Comely Garden, lying near Edinburgh, for the space of 500 years from Martinmas 1797, at a rent of 46*l.* 12*s.* 4*d.* per annum, but which, after the lapse of seven years, was to rise to 60*l.*, with a power of granting sub-leases for the purpose of building. Lyon entered into possession; but having afterwards incurred an arrear of rent from Candlemas 1812 to Candlemas 1815, amounting, with interest and expences, to above 218*l.*, an action was raised against him by the trustees of Sir James Montgomery, then deceased, for payment of the amount due and for avoiding the lease, and decret was obtained, declaring the lease to be at an end, and ordaining removal from the premises. On being charged, in virtue of the sheriff's precept, to remove, Lyon applied to John Reid, with whom he had

been connected in business, to advance to the trustees the above amount; and, in consequence, Reid, by the hands of his son, John Reid junior, writer in Edinburgh, paid the amount to Robert Stuart, factor for the trustees, who thereupon gave the following receipt: “Edinburgh, 14th July 1815. — Received by me, factor for Sir James Montgomery’s trustees, from Mr. John Reid, writer in Edinburgh, the sum of 218*l.* 17*s.* 4½*d.* sterling, in payment of the annexed account of rents, and interest, due by Peter Lyon, druggist in Edinburgh, to said trustees; to the extent of which sum I oblige the said trustees to grant you an assignation to said rents and diligence, but upon your own expences.” In the same month Reid junior drew and extended an assignation by the trustees in favour of Reid senior, on the narrative of the lease and trust deed in their favour, the falling into arrear, the above-mentioned payment, and stating that in respect thereof the trustees suspended the ejectment of Lyon from the premises, and waived the effect of the irritancy incurred and declared by the decree at their instance, and agreed to assign the same to Reid senior, as a collateral security to him against Lyon, and his heirs and successors, for the reimbursement of the sum so advanced and paid to the trustees by Reid, and future interest and expences which should ensue thereupon, but always under the qualities and conditions after specified: and the assignation then proceeded, “we (the trustees) do hereby not only acknowledge the receipt from him of the said sum of 218*l.* 17*s.* 4½*d.* sterling, but also assign and convey to him, and his heirs and assignees, the aforesaid decree and precept of the 15th of March last, and execution thereof of the 23d of May last, and sums thereby due,

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and consequents, with all action and execution competent against the said Peter Lyon and his heirs, and estate and effects, in so far only as the same shall not interfere with or impair our security under the aforesaid contract of lease, and subject-matter thereof, for payment of the future rents, interest, and penalties, if incurred, and the fulfilment and performance of the other obligations, conditions, and regulations undertaken by and incumbent upon him, as therein expressed; and with full power of recovery to the said John Reid and his aforesaid, whom we hereby substitute in our full right, in relation to the security and recovery of the sums now paid to us, and consequents, but under the qualities aforesaid; and having herewith delivered to him the said precept and execution thereof, we warrant these presents from our own acts and deeds derogatory hereto, but no further."

Next day Lyon executed an *ex facie* absolute assignation (drawn by Reid junior) in favour of Reid senior, narrating the contract of lease, the circumstances which had led to the lessee's pecuniary embarrassments, and then stating that the trustees "brought an action before the sheriff of Edinburgh against me of irritancy of the lease, and for payment of the arrears of rent, interest, and expenses; and on the 15th day of March last obtained decree of declarator of irritancy, and forfeiture of said lease, and for payment of said arrears, interest, and expences, and also for removing and ejecting me, my family and dependents, from the premises; and on the 23d of May last I was served with an execution to the effect aforesaid, but by the interposition of friends, the pursuers were prevailed upon to postpone my actual ejection: and whereas John Reid having,

on the 14th day of July current, made payment to the pursuers, the said trust-disponees, of the said arrears, interest, and expences, amounting to 218*l.* 17*s.* 4½*d.* sterling, conform to receipt of that date, by Robert Stuart, their factor, containing an obligation to obtain an assignation from the said trustees, and also conform to an assignation granted pursuant thereto by the said Sir James and Archibald Montgomerys, being a quorum of the said trust-disponees, of the said decree, precept, and execution, and of the whole sums thereby due to the said John Reid, and his heirs and assigns, dated the 26th and 28th days of July current, all upon condition of my executing and delivering to him, simul et semel, the assignation and conveyance of the said lease as after written: therefore, and in consideration thereof, I have assigned, as I do hereby assign, dispone, and convey to the said John Reid, and his heirs, assigns, or sub-tenants, the aforesaid contract of lease of the said lands of Comely Garden, &c., with the whole clauses and obligations therein contained, incumbent on the lessor and his heirs and disponees; but with the burden also of implement and performance of the whole conditions, clauses, and obligations therein contained, imposed on, and thereby undertaken by me for myself, and my heirs, assignees, and sub-tenants, in all respects; and that for all the years and space to run thereof, from and since the term of Martinmas last, which is hereby declared to have been the entry of the said John Reid to the premises, notwithstanding the date hereof, and as for this present crop and year 1815; with full power to the said John Reid and his foresaids, whom I hereby substitute in my full right therein, to exercise all the powers and privileges thereby conferred, he and they always paying

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the rents, fulfilling and implementing the whole obligations, conditions, and regulations undertaken by me as thereby prescribed, and freeing and relieving me and aforesaid thereof in all time coming. And having herewith delivered an extract of the said contract of lease, I bind and oblige myself, my heirs and successors, to pay and discharge the rent due at Lammas next, being the first term for crop 1815, and relieve them thereof, and of all public and parochial burdens affecting the same, in respect of that crop and antecedents; and also to warrant this present assignation to the said John Reid and his aforesaid, from all acts and deeds done or to be done by me, derogatory hereto in any shape." This assignation was intimated to the trustees, and Buchan, a friend of Reid, gave their factor the following letter: "In respect you have this day delivered
 "to me the assignation by Peter Lyon to Mr. John
 "Reid, late of the Tontine, Glasgow, of the lease of
 "Comely Garden, granted by the late Lord Chief
 "Baron Montgomery to Mr. Lyon, duly intimated to
 "the trust-disponees, upon condition that the said John
 "Reid, who paid up the arrears due at Candlemas last,
 "shall grant an obligation for the punctual payment of
 "the rent of this and the four subsequent crops, which
 "I engage to procure and exchange with this, other-
 "wise shall stand bound to the same effect to the said
 "trust-disponees; and remain," &c. Lyon continued in possession of the premises until June 1826, when he died; but it was alleged that the rents had been paid by Reid senior.

A few months before Lyon's death, John Reid junior, upon a requisition by Grant, solicitor for Lyon, for a statement of the nature and extent of Reid senior's

claim against Lyon, and to be allowed to borrow the grounds of the claim, transmitted to Grant an account, with relative documents, (consisting of extracts of the two assignations, the sheriff's precept and charge thereon, the state of rents, and receipts given by the factor,) of the sums of money, amounting to above 800*l.*, paid by Reid senior on behalf of Lyon, and which was in part composed of 218*l.* 17*s.* 4½*d.*, being precisely the sum of arrears advanced to the factor in 1815, with progressive interest, deducting property tax, down to February 1826. Immediately on Lyon's death, on the 12th June 1826, Reid junior demanded and obtained back the papers and documents from Grant; and on the 19th of the same month Reid senior presented a petition to the sheriff, designing himself "principal tacksman of the "lands and others after mentioned;" setting forth, that Lyon had occupied and possessed the premises under the petitioner, as principal tacksman, ever since the date of the assignation; that the rents were never paid by him to Reid senior, and now amounted to above 800*l.*, besides the rent of the current crop: and praying that the sheriff would grant warrant of sequestration of the effects on the premises, and also to authorize a person of skill to take possession of the subjects, (which in the meanwhile, from the absence abroad of the person understood to be the nearest heir to Lyon, remained untenanted,) and manage the same, under the orders of Court; and he farther craved service on Peter Lyon, residing at Comely Garden, grand-nephew of the deceased, and nearest relative in Scotland. The sheriff granted warrant to sequester in the usual form; and authorized an interim manager to take possession. Lyon, the grand-nephew, put in answers, not opposing the

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petition, but reserving all right to the subjects in question, and in March 1827 raised a summons of declarator against Reid senior on the above facts, and concluding to have it found and declared that the pursuer was the nearest and lawful heir in heritage of the deceased Peter Lyon, and as such had good right and title to succeed to the contract of lease, and the subjects thereby let, in so far as the said Peter Lyon had right or interest therein; and further, that the assignation by the deceased was not an absolute and irredeemable assignation of the contract of lease and subjects therein mentioned, but was granted to the said defender merely in security of the repayment of the sum of 218*l.* 17*s.* 4½*d.*, and interest and expences thereon, and was redeemable by the said Peter Lyon on repayment of the said sums; and that the same was still liable to be redeemed by the pursuer on making payment thereof. The pursuer represented that the lease was now worth 5,000*l.*, and that no party engaged in the transaction ever considered Reid senior as principal tacksman, but merely creditor of the deceased for the amount of the advances.

In defence Reid senior contended, that the decree obtained by the trustees of Sir James Montgomery became final, and that Peter Lyon's right to the lease was thereby terminated for ever; and further, that the assignation was absolute and not by way of security; and that this was evident from the circumstances of the case.

A supplementary action was subsequently brought by the pursuer, who had erroneously served himself heir of conquest, in place of heir in general; but which mistake he rectified by being served in the proper character.

The Lord Ordinary conjoined the two actions, and found, "that although the assignation by the late Peter Lyon, the pursuer's grand-uncle, to the defender, of the lease in question, bears to be an absolute conveyance, it is proved by the admitted facts and circumstances of the case, and the written evidence produced, to have been intended and understood by the parties merely as a security for repayment of certain arrears of rent advanced by the defender to the trustees of the late Sir James Montgomery the landlord, for behoof of the tenant, Peter Lyon; therefore finds and declares, that the pursuer, in right of his grand-uncle, is entitled to succeed to the lease; that the assignation by Peter Lyon to the defender is redeemable by the pursuer, on repayment of the sum of 218*l.* 17*s.* 4½*d.*, the sum advanced at the date of the assignation, and whatever other sums the defender can instruct that he advanced for the said Peter Lyon, on the faith of the security, with interest at the rate of five per cent. from the date of the said advances respectively till payment, together with the expences incurred by the defender in the transaction; and allows an account of the said advances, interest, and expences to be given in."

On appeal to the First Division, their Lordships, without hearing the pursuer's counsel, refused the desire of the reclaiming note, and adhered to the interlocutor of the Lord Ordinary, and found the defender liable in the expences incurred since the date of the Lord Ordinary's interlocutor; and remitted to his Lordship, to modify and decern for the same*.

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* 8 Shaw and Dunlop, 789.

- No. 8. Afterwards the Lord Ordinary modified the expences, and found, decerned, and declared against the
 16th July 1892. "defender in terms of the libel, upon payment being
 REID "made to the defender of the sum of 1,217*l.* 19*s.* 7*d.*
 v. "sterling, being the balance due by the pursuer to the
 LYON. "defender upon the state of the payments of rents, &c.
 June 17, 1890. "made by the defender upon the faith of the security
 "in question, with interest on the amount of the
 "defender's advances from 2d February 1827, at the
 "rate of five per cent., till payment; finds the pursuer
 "entitled to the expences incurred by him in the con-
 "joined actions; but, in respect that the first summons
 "was rendered unnecessary by the pursuer's claiming
 "as heir of conquest, finds him not entitled to the
 "expence of that summons, or the proceedings occa-
 "sioned by the pursuer's claiming in the said character;
 "appoints an account thereof to be given in, and
 "remits to the auditor to tax and to report."
 The defender reclaimed, and maintained that it was
 incompetent for the Lord Ordinary to award any ex-
 pences of the Outer House prior to the date of the in-
 terlocutor of count, by which only the expences of
 Jan. 21, 1891. opposing were found due; but the Lords adhered to the
 interlocutor complained of, and refused the note, and
 Feb. 4, 1891. found the complainer liable in farther expences*, which
 they afterwards decerned for.

Reid senior appealed.

Appellant. — It was never intended or understood,
 when the appellant acquired right to the lease in

* 9 Shaw and Dunlop, 308.

question, that he should hold the same in security or in trust for the late Peter Lyon or his heirs, and there is no fact or circumstance from which it can be inferred that this was the intention or understanding of the parties.

The appellant has good ground of complaint of the way the suit has been allowed to be conducted. The inept summons should have been at once dismissed; and it was irregular to conjoin an incompetent with a competent process. It was equally irregular to find him liable in expences.

Injustice is done to the appellant, even on the assumption that the respondent could establish his pretended right to the lease in question. He is not fully indemnified by the mere return of the sum, with interest, advanced. He is entitled to more.

Respondent.—The respondent has a good right and title to insist on the present action. The conjunction of the processes was agreeable to practice, and quite in form, and the award of expences regular.

The assignation was merely in security, and not an absolute conveyance, which is quite plain from the facts of the case, and amply supported by documentary evidence.

LORD CHANCELLOR. — My Lords, this case brings before your Lordships an appeal from six different interlocutors of the Lord Ordinary and the First Division of the Court of Session. I do not feel it to be necessary to enter at large into the circumstances of the case, nor assign reasons for the judgment I am about to recommend to your Lordships to pronounce. The point to which the argument has directed the attention

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No. 8. of your Lordships is, Whether the assignation of a lease,
16th July which was made by the ancestor of the respondent to
1832. the appellant, was granted to him for the purpose of
REID conferring upon him an absolute right of property, or
v. only with a view of being a security to him for the
LYON. payment of a debt, and therefore redeemable. The
conveyance or assignation appeared upon the face
of it to be absolute; and the principal question now
to be determined by your Lordships is, whether we
can look beyond the words of the conveyance; and
whether, if we can, the facts do afford sufficient evi-
dence of an intention distinct from that which the
words express. The terms of the conveyance appear
to vest in the assignee, the party to whom the lease
was assigned, the absolute lease; and it is contended,
that those words cannot be qualified by the facts of
the case evidencing the intention of the parties. The
Lord Ordinary was of opinion that the facts might
be looked to, and the First Division of the Court of
Session affirmed the judgment of the Lord Ordinary,
on reference to those facts, that this lease was assigned
only as a security for a debt. I am quite aware that it
is necessary that great attention should be paid, in
order to restrain this principle within its due bounds,
and to prevent courts adopting a possible conjectural
construction, as showing the existence of intention —
travelling out of the deeds themselves for the purpose of
fixing an intention upon the party by conjecture only;
not attending to that which is done so much as to that
which is supposed to have been the intention of the
parties. But, my Lords, upon looking fully into this
case, and the grounds upon which the decision has pro-
ceeded, I do not think that it can be said that it was

decided on such conjecture. Without travelling out of the deed, I think it appears that the judgment is right, and that the learned Lord Ordinary has proceeded on the legitimate rules of construction.

This was the residue of a term of 500 years of very valuable property, consisting of six acres in the immediate neighbourhood of Edinburgh. The consideration paid at the period of the execution of the assignation, it appears, was 218*l.* 17*s.* 4*d.*; and the interlocutor of the Lord Ordinary, affirmed by the Court, has held, on the account which was taken, that it was redeemable on the payment of 1,217*l.* 19*s.* 7*d.*, the principal and interest, the assignation being a security for the sum originally advanced, and the interest upon it to the date of payment. It is alleged that the property is worth no less than 5,000*l.* That precise value is, in terms, denied on the opposite side, but the denial is very loose; the utmost extent to which it goes is, that it is not so valuable. That may be taken to mean that it is not *quite* so valuable; but the appellant does not go on to say that it is not of much more value than the sum advanced, with the interest which has accrued upon it.

My Lords, there was an exception in respect of the expenses, but the appellant has no good ground of complaint there, as the expenses of the first, the incompetent summons, were not given against him. It is not necessary to enter into those circumstances. It is sufficient, upon the whole, to state to your Lordships, that I am, on consideration of the case, quite satisfied that the judgment of the Court below is right, and that I would advise your Lordships to affirm the several interlocutors complained of; but as the case has appeared to me not

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No. 8. altogether free from doubt, I shall not advise your
Lordships to allow the costs.
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The House of Lords ordered and adjudged, “ That the
“ appeal be and is hereby dismissed this House, and that
“ the interlocutors therein complained of be and the same
“ are hereby affirmed.”

RICHARDSON and CONNELL — MACQUEEN, — Solicitors.

[16th July 1832.]

WILLIAM BAIRD, victualler in Glasgow, Appellant. — No. 9.
Lord Advocate (Jeffrey).

ROBERT ROSS, victualler in Glasgow, Respondent. —
Dr. Lushington.

Property—Servitude.—The Court of Session having found that the proprietor of a house, who had access to it through a contiguous area, disposed with its buildings and houses to another person, under an obligation to make an arched close for a cart-entry to the area, with modified restrictions as to erecting buildings, and with the declaration that the area in question “shall be mean property for the preservation of light,” had a right to load and unload carts in the area, the House of Lords reversed, and remitted with a declaration.

IN 1824 the trustee on the sequestrated estate of Robert Smellie sold in lots, agreeably to a plan of the ground referred to in the dispositions, a piece of ground, at Calton-mouth of Glasgow, belonging to the bankrupt. William Baird bought a portion of the property, being the seventh lot, comprehended within the letters A B C D on the ground plan, “bounded on the south by lot “No. 8. of the said property, lately sold by me, as “trustee aforesaid, to Robert Ross, victualler in Glasgow, the said lot No. 8. comprehending the area “within the letters E F G H on said plan; on the “east, by the foresaid front and back tenements of land “composing Nos. 1. to 6. inclusive of the said property “sold by me to Alexander Allan and others; on the

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“ north, by a line running parallel with the north front
“ of the said tenement sold to the said Alexander Allan
“ and others; to the east and westward, till it reaches
“ the north-west angle of ground hereby conveyed;
“ and on the west, by the property of George Scott of
“ Daldowie; together with the whole buildings and
“ houses erected on the said piece of ground hereby
“ disposed, with free ish and entry thereto; declaring
“ that the said William Baird and his foresaid shall
“ have right to the half of the mean gable of the stone
“ tenement, which composes the first five lots sold by me
“ to Alexander Allan and others, as aforesaid; but it is
“ hereby specially declared, that the said William Baird
“ and his foresaids shall be bound and obliged to make
“ an arched close of eight feet wide and ten feet high
“ at the east end of the piece of ground hereby dis-
“ posed, for a cart-entry to the said lot No. 8. as well
“ as free ish and entry to the said lots Nos. 1. to 6.
“ inclusive of the said property; farther, the said
“ William Baird and his foresaids are hereby expressly
“ restricted, in all time coming, from erecting any
“ buildings on the said piece of ground farther south
“ than a continuation westward of the line of the back
“ wall of the front stone tenement, which has the other
“ half of the foresaid mean gable, and which composes
“ the said first five lots of the said property, excepting
“ a dunghill and necessary-house at the west extremity
“ of the said piece of ground hereby disposed, but
“ which buildings are not to exceed eight feet in
“ height; declaring that the remainder of the said
“ piece of ground, south from the foresaid line of back
“ wall, shall be mean property for the preservation of
“ light.”

Robert Ross had bought the area or piece of ground comprehended within the letters E F G H on the ground plan, being the 8th lot, “together with the whole houses “and other buildings erected on the said area or piece “of ground, with the whole pendicles and pertinents “thereof; bounded, the said area or piece of ground “hereby disposed, on the north, partly by lot No. 7. of “the said property, sold by me, as trustee foresaid, to “William Baird, victualler, Calton-mouth, Glasgow, “and partly by lot No. 6. of the said property, sold by “me, as trustee foresaid, to Thomas Wilson, spirit-dealer there; on the west, &c.; with free ish and “entry to the said area or piece of ground hereby “disposed by a cart-entry to be formed along the east “boundary of the said lot No. 7; and which entry the “said William Baird, and his heirs and successors, proprietors of the said last-mentioned lot, are bound to “give to the said Robert Ross and his foresaids in all “time coming, as expressed in the disposition to be “granted by me in favour of the said William Baird, “and also by the common passage leading to the said “ground, now disposed, from the main street of Calton, “as was enjoyed by the said Robert Smellie previous “to the sequestration of his estate.” Ross had two doors of entry to his buildings.

Upon the respective titles thus set forth the question arose, viz. Whether the area described in Baird’s disposition, and therein declared to be “mean property “for the preservation of light,” was exclusively the property of Baird, subject to a servitude of lights in favour of Ross, or whether, on the other hand, the parties were joint proprietors thereof?

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No. 9. Ross, acting upon the latter supposition, began to make use of every part of the area in question for the purpose of loading and unloading his carts, and for all other purposes that an absolute or co-proprietor could use it.

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For this reason, and also on the allegation that Ross, instead of collecting and carrying off the water from the roof of his tenement built along the north boundary of the area, allowed the water to fall from the roof on the property of Baird, to his great inconvenience and annoyance, Baird presented a bill of suspension and interdict, praying "for letters of suspension and interdict in the premises, interdicting and prohibiting the respondent (Ross) from loading or unloading his carts upon the area or piece of ground above mentioned, or otherwise trespassing or encroaching thereon; and also from allowing the water to fall from the roof of his tenement, which is built along the north boundary of the said area, upon the property of the complainer." *

Answers for the respondent, accompanied with a sketch of the property, were lodged; and thereafter June 17, 1821. the Lord Ordinary, "in respect that the close or area in question does not appear to be the exclusive pro-

* There had been previously a litigation between these parties in relation to the same premises. Baird erected a necessary and dunghill in the mean area immediately under Ross's windows, and closing up one of his doors. Ross complained, and the Lord Ordinary (Mackenzie), on the 8th Dec. 1827, found that "it appears emulous in the defender (Baird) to have built the necessary so far as to shut up one of the doors of the pursuer's (Ross) tenement, and therefore that the necessary must be taken away, and the dunghill also, in so far as to leave free access to the said door." And the Court adhered (3d Feb. 1829), directing that the necessary should be removed to the northern extremity of the dunghill.—7 Shaw and Dun, 361.

“ perty of the complainer, but is declared in his own
 “ titles to be ‘ mean property for the preservation of
 “ light,’ and that the acts complained of are either ex-
 “ pressly warranted by the titles, or at all events do
 “ not interfere with the object for which the area was
 “ declared to be common,” refused the bill, and found
 the suspender liable in expenses; and the Court, on
 advising a reclaiming note, adhered to the interlocutor
 submitted to review, and found additional expences of
 this discussion due*, which were afterwards decerned
 for by the Lord Ordinary.

Baird appealed.

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Appellant.—The appellant has offered to prove that the respondent not only loads and unloads his carts upon the area in question, but that he makes use of it otherwise in every possible shape, just as if it were his own, or as if it were common property between him and the appellant. Indeed, the respondent does not deny the fact. Now, while the appellant admits that this area is subject to a negative servitude in favour of the respondent, in virtue of which the appellant is prohibited, to a certain extent, from building upon it, it is submitted to be equally clear that the area is truly the appellant’s property. This is quite plain, from the description of the boundaries of the subjects belonging to the appellant and respondent respectively, as compared with the plan referred to in the titles.

The same conclusion is confirmed by the very existence of the servitude in favour of the respondent. It is a contradiction in terms to say that a man has at

* 7 Shaw and Dun, 766.

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once a right of property, either joint or exclusive, and a right of servitude, in the same subject.

This furnishes an answer to part of the ratio decidendi assigned in the Lord Ordinary's interlocutor; namely, that in the clause in the appellant's title, which prohibits him from building on the piece of ground in question, except in a certain way, it is declared, "that the remainder of the said piece of ground, south from the foresaid line of back wall, shall be mean property for the preservation of light."

If the words "mean property" stood alone and were not necessarily connected with the context, the Lord Ordinary's conclusion might be plausible enough; but it will be observed that, in the preceding part of the clause, which contains the description and the boundaries of the property disposed to the appellant, the piece of ground in question is, in so many words, conveyed to him. Of this ground, so conveyed, there is a qualification or restriction of the appellant's right of property, viz. a restriction against building beyond a certain extent and a certain height; and then comes, as connected with it, the declaration that "the said piece of ground shall be mean property for the preservation of light." But this plainly imports nothing more than a servitus luminum in favour of the respondent, the adjacent proprietor. It gives him no right of joint property. The other ratio decidendi, "that the acts complained of are expressly warranted by the titles," is a mistake. There is no such warrandice, either express or implied. As to the remaining point, it is clear that the respondent should not allow the water to fall from the roof of his tenement on the appellant's property.

Respondent.—The house upon the lot No. 8, purchased by the respondent, had been built and possessed for many years, with access to carts, which were loaded and unloaded there; and it was an express stipulation, in the respondent's titles, that there should be this access, and in the appellant's, that there should be an arched close made in order to preserve it. The appellant was taken bound to make his arched close ten feet high and eight feet broad, in order that loaded carts might have access. It is absurd to suppose that where there is free ish and entry to carts, these carts are neither to load nor to unload, nor to turn round.

The respondent bought the house, which had stood for forty or fifty years exactly as it is now. The rain-water descends from the roof upon the common area precisely as it did before he purchased it. There is not therefore the smallest ground for altering the possession, which could not be otherwise according to the nature of the subject, and of which the appellant was fully aware when he made his purchase.

LORD CHANCELLOR:—My Lords, in this case I have read so much as to see that which I am sorry to have had occasion to perceive in other cases, that there has been the most vexatious conduct on the part of one of these parties towards the other, originating in a dispute between two neighbours who purchased different adjacent lots of property in the city of Glasgow. The appeal has in its nature nothing to recommend it: it is very distressing to see such questions as some of those which have been brought into controversy between these parties. The case, however, involves the consideration of a point of more importance than at first sight ap-

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peared — I allude to the form of the proceedings. A party has clearly a right to appeal on even the most minute rights. If he conceives that the court has decided erroneously, undoubtedly he is entitled to bring before the court that erroneous judgment; and the court of appeal must deal with it upon principle, and without reference to the trifling value of the matter in question. A party has a right to have his case disposed of on legal principles, however vexatious the conduct of those who have instituted the proceeding, or of those who have defended it, may have been. In this case the parties are near neighbours, occupying two portions of a property in the city of Glasgow, which was sold in different lots, the one purchasing lot 7, the other lot 8; and the question is, whether the respondent, who purchased lot 8, possesses a right to load and unload his carts on lot 7, his conveyance giving him a right to free ish and entry to the said area, that is, lot 8, by a cart-entry to be formed along the boundary of lot 7. The proprietor of lot 7, the present appellant, the suspender in the court below, contends that he purchased that property as his own, subject only to one servitude, that of his not raising any building which could obstruct the light; that that lot 7. is to be considered a mesne property for the purposes of the preservation of light — this being stated not with any remarkable distinctness, which I shall say a word on presently; but he does maintain, as he did in the court below, that he purchased that lot, No. 7, as his property; and that between the two lots there was to be this common ground — common not entirely, but for the purposes of preventing the obstruction of the light, and not conferring on the owner of No. 8. the sort

of joint ownership or occupancy which the owner of No. 8. has asserted over that lot 7, namely, that the owner of No. 8. has a right to load and unload his carts upon that space. The description in the conveyance of No. 7. is, that the purchaser (the appellant) is bound so and so: “but it is also hereby specially declared, that the said William Baird and his fore-
 “saisds shall be bound and obliged to make an arched
 “close of eight feet wide and ten feet high at the east-
 “end of the piece of ground hereby disposed, for a
 “cart-entry to the said lot No. 8, as well as free ish and
 “entry to the said lots, No. 1. to 6. inclusive, of the
 “said property; farther, the said William Baird and
 “his foresaisds are hereby expressly restricted in all
 “time coming from erecting any buildings on the said
 “piece of ground farther south than a continuation
 “westward of the line of the back wall of the front
 “stone tenement, which has the other half of the fore-
 “said mean gable, and which composes the said first
 “five lots of the said property, excepting a dunghill
 “and necessary house at the western extremity of the
 “said piece of ground hereby disposed, but which
 “buildings are not to exceed eight feet in height”—
 that is, to prevent the obstruction; “declaring, that the
 “remainder of the said piece of ground, south from the
 “foresaid line of back wall, shall be mean property for
 “the preservation of light.” Not only is the purchaser restricted by the particular words to which I before referred from erecting buildings on this spot, but, on the other part, nothing shall be done to obstruct the light; it is a mesne property for the preservation of light. Then the property purchased by the respondent is thus described in his disposition:—“All and whole that

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“ area or piece of ground, situated at Calton-mouth of
“ Glasgow, which is comprehended within the letters
“ E F G H on a ground plan of the whole property,
“ then belonging to the sequestrated estate of Robert
“ Smellie,” and so forth, “being the eighth lot in the
“ articles and minutes of roup, together with the whole
“ houses and other buildings erected on the said area
“ or piece of ground, with the whole pendicles and
“ pertinents thereof, bounded, the said area or piece
“ of ground hereby disponed,” in the manner therein
mentioned, “ with free ish and entry to the said area
“ or piece of ground hereby disponed by a cart-entry
“ to be formed along the east boundary of the said
“ lot No. 7.” That disposes of the mode of entry ; and
the mode in which that is to be given is by cart-entry,
“ to be formed along the east boundary of the said
“ lot No. 7 ; and which entry the said William Baird,
“ and his heirs and successors, proprietors of the said
“ last-mentioned lot, are bound to give to the said
“ Robert Ross and his foresaids in all time coming, as
“ expressed in the disposition to be granted by me in
“ favour of the said William Baird, and also by the
“ common passage leading to the said ground now
“ disponed from the main street of Calton, as was
“ enjoyed by the said Robert Smellie previous to the
“ sequestration of his estates.” It appears that this
conveyance provides for ish and entry along the east
boundary of the lot 7. by means of a covered way,
which covered way the owner of lot 7. is not only
bound to keep free, to allow the owner of lot 8. to
use for the purpose of access to his property, but to
keep an opening above for the admission of light ; and
the question between the parties is, whether these titles,

beside preserving free the admission of light, gave any thing more to the owner of No. 8. than an entry to his house or houses? With respect to a mere footway, that is not the present question, nor does it save any thing to the purchaser of No. 8, in respect of a foot entry to that lot, whether it gave any thing more than a right of way with his carts through that covered entry, and along the east side of lot No. 7, whereby he might go to his own premises or not; and I feel myself bound to say that I can see nothing more. It appears to me that here is nothing like a servitude for any thing more than the keeping a vacant space open as a cart-way, and a right to have a free opening for the purposes of light; that nothing more is granted to the purchaser of No. 8. than a right of way through that covered entry, and along the east line of No. 7,—a line partly covered and partly uncovered; that there is nothing operating in the smallest degree towards constituting a servitude to allow of the loading and unloading carts in the vacant space of No. 7. Then it is said that there are two doors of entry by which the owner of No. 8. enters to his buildings by the vacant space: this, however, is not the ground of the judgment of the court below, and this is not the ground which is admitted upon the face of these pleadings; but, if it were, it would not prove the case respecting the loading and unloading of carts. If we take a review of the acts which are set forth by way of statement, there appears to be evidence of certain transactions which led to disputes between the parties in 1827; and to an interlocutor of Lord Mackenzie, as Lord Ordinary, of the 18th of December 1827, compelling the defender, the present appellant, to remove a necessary and dunghill,

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which had obstructed and partly covered one of the respondent's doors—that interlocutor established the right of this party to his door entering into the vacant space of No. 7. Still the admitting his right to that door would give him no such right as that claimed here, of access for the purpose of loading and unloading his carts. It might give a footway by way of servitude; but it would not, nor will the judgment I should advise your Lordships now to pronounce, sustain the larger servitude of a right to drive his carts along that way, and to load and unload them on that space. Lord Fullerton, on the case coming on for hearing, pronounced this interlocutor:—“In respect that the close or area in question does not appear to be the exclusive property of the complainer (that is the appellant), but is declared, in his own titles, to be mean property for the preservation of light, and that the acts complained of are either expressly warranted by the titles, or at all events do not interfere with the object for which the area was declared to be common, refuses the bill; finds the suspender (appellant) liable in expenses.” Now, I cannot go along with this: it does, with great submission, appear to me that that close is the exclusive property of the party, unless in so far as it is affected by this particular servitude of the making a covered way, and keeping it open for the other party; and the condition, of this property being declared to be mesne property for the preservation of the light,—not mesne property generally,—but property lying between the parties, belonging, under servitude, in exclusive property to the one, although mesne property for the preservation of the light as to both; and to be used by the party to whom it belongs

so as not to obstruct the light. His lordship adds, "And that the acts complained of are either expressly warranted by the titles, or at all events do not interfere with the object for which the area was declared to be common." Now my opinion certainly is, that the acts are not expressly warranted by the titles, for the reasons I have given. Taking the other alternative of Lord Fullerton, it is very true that these acts of loading and unloading do not interfere with the rights for which the area was declared to be common; but more is required in order to justify the act of one party on the property of another than that those acts do not interfere with another object; it was necessary to show that the acts were justified by the title of that party; namely, that the respondent had a right to drive through, and to load and unload. The onus lies upon him who makes such a claim.

If there had been a little more strictness in pleading the right claimed, there is no doubt much litigation would have been saved. It should have appeared that the party claimed a right, not only to enter through the covered way, but to go through lot 7, claiming a right to deviate from that line, and to enter upon that vacant space, and they should have set forth in what way he claimed that right, and for what purpose. It is insinuated in these pleadings, but not distinctly stated, that these premises were always used in the way alleged, not merely by foot passengers, (allowing this door to be there for their use, and they walking across the space,) but that, in respect of this vacant space, those who had the property before had been always accustomed to drive carts there, and to load and unload carts there. That, however, is a matter of fact which must be proved, and

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it is not proved by the individual upon whom the onus lies. I feel myself, therefore, compelled, though reluctantly, to recommend to your Lordships to reverse the interlocutor complained of, and to remit, with instructions to direct the bill of suspension and interdict to pass, but with one exception. I think the bill ought to “interdict and prohibit the respondent from loading or “unloading his carts upon the area or piece of ground “above mentioned.” With respect to the other part— “and also from allowing the water to fall from the roof “of his tenement, which is built along the north “boundary of the said area, upon the property of the “complainer,” I see no occasion to pass that part of it. The consequence of this will be, that I must, upon these grounds, propose to your Lordships to reverse this interlocutor, and to make the declaration I have stated.

The House of Lords ordered and adjudged, “That the “said several interlocutors complained of in the said appeal “be, and the same are hereby reversed. And it is further “ordered, That the said cause be, and the same is hereby “remitted back to the said Court of Session, with instructions to the said Court to pass the said bill of suspension, “and grant and continue the interdict therein prayed, so “far as regards the respondent loading or unloading his “carts upon the said area or piece of ground, or otherwise “trespassing or encroaching thereon; but to refuse to pass “the said bill of suspension or grant interdict as regards “the water from the roof of the respondent’s tenement, as “therein mentioned. And it is further ordered, That the “said Court of Session do determine the whole matter of “costs between the parties in the Court of Session, and “otherwise proceed further in the cause as shall be just, “and consistent with this judgment.”

DEANS—JACKSON,—Solicitors.

[16th July 1832.]

Sir GEORGE CLERK of Pennycuik, Baronet, and others, No. 10.
Appellants.—*Lord Advocate (Jeffrey) — Spankie.*

Dr. WALTER ADAM, Respondent.—*Lushington —*
C. H. Maclean.

Property.—Whether a portrait of a late rector of the High School of Edinburgh, taken at the request and expense of an association of his pupils, and placed in the school-room, be, after his death, and on the removal of the school to a new building, the property of the association, or of his son and representative? The Court of Session having found it to be the property of the association, but decreed that it should remain in the High School, the House of Lords reversed the latter finding.

IN the year 1808, Dr. Adam, then and who had been since 1768 rector of the High School of Edinburgh, was requested by Sir George Clerk and other persons who had been educated at that school, and were members of an association called the High School Club, to sit for his portrait, to be taken by Sir Henry Raeburn. The letter addressed to Dr. Adam, on this occasion, was as follows: “21st March 1808. Dear Sir, at a meeting of the High School Club some days ago, for the purpose of consulting how the members could best show you some mark of their regard, we are appointed a committee for carrying their resolutions into effect. In pursuance of these resolutions, we now beg leave to request that you will do us the

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“ favour to sit to Mr. Raeburn for your picture. We
“ are anxious to place in the school a memorial of our
“ gratitude, and of the high sense we entertain of the
“ advantages the public has derived for so many years
“ from your useful and important labours. We flatter
“ ourselves you will not be disposed to refuse this
“ favour, when you reflect, that we can ask it from no
“ other motive but those of the most sincere regard and
“ esteem, and that it may serve as an inducement to
“ those who shall come after you to emulate the able
“ and conscientious discharge of your official duties, by
“ which you have contributed so much to extend the
“ fame of our flourishing seminary.” Dr. Adam ac-
ceded to this request, and the portrait was accordingly
taken; and afterwards, on the 9th of August 1809,
Dr. Adam wrote to a member of the club as follows:
“ Dear Sir, I have been so much taken up with one
“ thing or another since I received your kind favour,
“ that I could not sooner find leisure to acknowledge
“ it. I feel my desire to prosecute this work (Dic-
“ tionary) increased by the conspicuous manner in
“ which you and your friends have been pleased to
“ exhibit me to public view. I went yesterday to
“ Mr. Raeburn’s with a gentleman who was desirous
“ to see the picture, and found it decorated with a very
“ splendid frame, very different indeed from what it
“ was in at the public exhibition. You have ordered
“ every thing concerning it with so much propriety,
“ and so far beyond my expectation, that whatever you
“ determine with respect to the placing of it, and the
“ inscription, will be quite agreeable to me. I have
“ only to request, that the names of those gentlemen
“ who have done me so great honour may be recorded,

“ and that their reasons for doing so, which you so
 “ handsomely expressed in your first letter to me on
 “ the subject, may be shortly mentioned. The shorter
 “ and more simple the inscription is made the better.”

Dr. Adam having died in December 1809, and before the picture was placed, a petition was presented by the members of the High School Club to the magistrates of Edinburgh, as the patrons of that seminary, for permission to place the portrait in the High School library; and a special request was made that the magistrates would acknowledge, in their deliverance on the said petition, that the property of the portrait remained with the petitioners, and that they, or the majority of the survivors of them, might at any time thereafter dispose of the same as they should think fit; and that the portrait should not be at the disposal of the magistrates of the city during the survivance of any of the petitioners; and that failing them, and all provision by them to the contrary, the magistrates should then preserve the picture in perpetuam rei memoriam.

The magistrates granted the prayer of the petition, and authorized the picture to be placed in the High School library upon the terms therein mentioned. The picture was accordingly placed in the High School library, with this inscription, “ This portrait of Alexander Adam, LL.D., rector of the High School from June 8, 1768, to December 18, 1809, author of Roman Antiquities, &c., was placed here as a mark of gratitude and respect by fourteen of his former pupils, A. D. 1810.” There the picture remained till the removal of the school, in 1829, from the old premises in the High School yard to those erected on the Calton Hill, to which new premises the picture

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was carried. Upon occasion of this removal an application was made, on the 12th of June 1819, to the magistrates, on behalf of the club, referring to the petition and deliverance before mentioned, and stating that the old High School having been pulled down or disused, the club were desirous to resume possession of the picture, and craved warrant to have the same delivered up to them.

The magistrates, upon this petition being presented, made intimation thereof to Dr. Walter Adam, the son and heir of Dr. Adam, who thereupon entered a claim to the effect of having the picture disposed of in terms of the condition on which his father consented to sit for it, and which condition he stated to be, that the picture should remain in the library of the High School as a part of its property, and be independent of the controul of the High School Club, or any other person or persons whatever. To obtain a decision on these opposite claims, the magistrates raised an action of multiplicity, and called as parties Dr. Walter Adam and the surviving members of the High School Club; and

March 2, 1831. the Lord Ordinary found, " that the picture in question
" is the property of the claimants, Sir George Clerk
" baronet, and others, members of the High School
" Club: Finds that the intention expressed by them, of
" placing it in the library of the High School, was not
" a condition stipulated in favour of Doctor Adam or
" his representatives, on which they are entitled to
" found in this action: Finds there is evidence that it
" was not so understood by Dr. Adam himself: Prefers
" Sir George Clerk baronet, and others, members of
" the High School Club, to the picture in question,
" and grants warrant to, authorizes and ordains the

“ raisers of the multiplepointing to deliver up the same
 “ to the said claimants, and decerns accordingly,” with
 expences.

Against this interlocutor Dr. Walter Adam reclaimed to the Court of Session, praying inter alia that the Court should find that the intention expressed by the members of the High School Club, of placing the portrait in question in the library of the High School, was a condition stipulated in favour of the late Dr. Adam, and was so understood by him, upon which the claimant Dr. Walter Adam is entitled to found in this action.

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The First Division adhered “ to the interlocutor re-
 “ claimed against, in so far as it finds that the picture
 “ in question is the property of the claimants, the mem-
 “ bers of the High School Club: but, quoad ultra, they
 “ alter the said interlocutor, and find that it was an
 “ implied condition in the treaty betwixt the Club and
 “ the late Dr. Alexander Adam, when he sat for his
 “ picture to the late Mr. Henry Raeburn, that the por-
 “ trait was to be placed in the High School of Edin-
 “ burgh, as a memorial of the high sense the claimants
 “ entertained of the advantages the public derived from
 “ his useful and important labours, and as an induce-
 “ ment to those who might come after him to emulate
 “ the able and conscientious discharge of his official
 “ duties, by which he had contributed so much to ex-
 “ tend the fame of the High School: And they accord-
 “ ingly decern and declare, that the said picture shall
 “ remain in the High School of Edinburgh in perpetuum
 “ rei memoriam; and that the Magistrates and Council
 “ of the city of Edinburgh, as the patrons of that semi-
 “ nary, shall be answerable that it is properly placed
 “ therein, agreeably to the object in view, and care-

- No. 10. " fully protected from all injury: Find no expences
 " due by either of the parties." *
 16th July Of this judgment, excepting in so far as it found
 1832. " that the picture in question is the property of the
 CLERK " claimants, the members of the High School Club," Sir
 and others George Clerk and others complained, and appealed.
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Appellants.—The appellants are, without dispute, the proprietors of the picture, and are therefore entitled to the custody and to the disposal of it.

There was no contract, express or implied, between the appellants and the late Dr. Adam, by which the appellants bound themselves to deposit the picture in question for ever in the High School. Even although there were reason, from the terms of the letter of March 1808, to hold that there was an implied contract between Dr. Adam and the appellants that his portrait should be hung up in one particular place, still the Doctor, by his subsequent communication with the appellants, viz. by his letter to them of 9th August 1809, plainly intimated that he did not understand that there was any such implied contract.

On the contrary, when the appellants placed the portrait in the school, they stipulated with the proprietors of the building, who are patrons of the school, that they, the appellants, should be entitled at any time during their lives to withdraw the portrait; but, in face of this agreement, the portrait has been removed from the local situation in which the appellants and the late Dr. Adam contemplated that it should remain. It was no part of the understanding between the appellants and Dr. Adam

* 9 Shaw and Dun. 379.

that his portrait should be removed from the High School if the buildings of the old school should be erected on another situation.

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Respondent.—The respondent has a legal title and interest to enforce every agreement entered into with his deceased father; and, in particular, to insist that his portrait shall be applied to the purpose or placed in the situation to which it was destined by the transaction, agreement, or understanding in virtue of which his father consented that it should be formed or painted.

If the appellants have any right of property in the portrait in question, which seems more than doubtful, yet as, by the original proposal which they made to Dr. Adam, in virtue of which he was induced to sit for his portrait, it was destined to a specific public purpose, the appellants are bound by the terms of their own proposal, which it is not competent for them (nor have the town council the power) to alter after the death of Dr. Adam, more especially in the face of opposition by the respondent, his son and legal representative, and without the decided approbation of the patrons of the High School of Edinburgh.

It was in that school that Dr. Adam understood that his portrait was to be placed, and remain, and in that school it is intended to deposit it, for the institution is not altered, but improved, by the accommodation afforded by a new and finer building. Cadell, 1st June 1804. (Mor. 3 App., voce Literary property.)

LORD CHANCELLOR:—My Lords, in this case it appears that a society was formed in Edinburgh, consisting of gentlemen who had been educated in the High

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School of Edinburgh, under the superintendence of a very learned rector of that school (the father of the respondent), who is known to have been distinguished in the literary world by his useful and important labours, and to have been highly esteemed by those who had the benefit of his instructions. The gentlemen, thus associated in what was called the High School Club, appear to have requested that he would sit for his picture, stating it to be their intention to hang up that picture in a conspicuous part of the premises which belonged to this school. The letter by which they applied to him is in these words:—“ March 1808. Dear Sir,—At a meeting
 “ of the High School Club some days ago, for the purpose
 “ of consulting how the members could best show you
 “ some mark of their regard, we are appointed a committee for carrying their resolutions into effect. In
 “ pursuance of these resolutions, we now beg leave to
 “ request that you will do us the favour to sit to
 “ Mr. Raeburn for your picture. We are anxious to
 “ place in the school a memorial of our gratitude, and
 “ of the high sense we entertain of the advantages the
 “ public has derived for so many years from your useful
 “ and important labours. We flatter ourselves you will
 “ not be disposed to refuse this favour, when you
 “ reflect, that we can ask it from no other motive but
 “ those of the most sincere regard and esteem, and that
 “ it may serve as an inducement to those who shall
 “ come after you to emulate the able and conscientious
 “ discharge of your official duties, by which you have
 “ contributed so much to extend the fame of our
 “ flourishing seminary.”

The answer to this letter does not appear, but the result was, that Dr. Adam sat for his picture to Mr. Rae-

burn, and it proved one of the most successful efforts of that able artist. After having been publicly exhibited, it was hung up in the High School, where it remained for nearly twenty years. In the year 1829, the building occupied as the High School having been pulled down, and the school removed, the appellants, Sir George Clerk, and the other gentlemen who had paid for the painting of this portrait, applied to the Lord Provost to have it delivered up to them, claiming a right to deal with it as their own property. Dr. Walter Adam, the respondent, objected to the removal of it; and that raised the question, the magistrates feeling some doubt whether they could surrender it contrary to the wishes of him the son and representative of the Rector. The magistrates raised an action of multiplepoinding in the Court of Session, making the surviving members of the High School Club on the one side, and Dr. Walter Adam on the other, parties to it, in order that they might present their respective claims.

The case having been argued, Lord Corehouse, the Lord Ordinary, before whom it was heard, pronounced an interlocutor, in which I entirely concur. (Quotes Lord Corehouse's interlocutor.)

My Lords, an appeal to the Inner House against this interlocutor was brought by Dr. Adam, of whose motives and conduct I wish to speak, not only with no harshness, but with the greatest possible tenderness and respect. His conduct has been dictated solely by filial piety, and a deep consideration for the character of his much-respected father. He has involved himself in a litigation, in which he has exposed him-

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self to expence, solely for the purpose, as he conceives, of protecting his father's memory. The case coming on before the First Division of the Court of Session, the Lords adhered to the interlocutor claimed against, " in so far as it finds that the picture in question is the " property of the claimants, the members of the High " School Club." Therefore, at all events, their Lordships adhere to that important and fundamental part of the interlocutor ; and they pronounce the picture in question to be the property of the gentlemen who requested the doctor to sit for it, who employed the artist, and who paid the artist ; but they alter the second branch of the interlocutor, and " find that it was an implied " condition in the treaty betwixt the club and the late " Dr. Alexander Adam, when he sat for his picture to " the late Mr. Henry Raeburn, that the portrait was " to be placed in the High School of Edinburgh, as a " memorial of the high sense the claimants entertained " of the advantages the public derived from his useful " and important labours, and as an inducement to " those who might come after him to emulate the able " and conscientious discharge of his official duties, by " which he had contributed so much to extend the " fame of the High School ; and they accordingly de- " cern and declare," according to the prayer, " that " the said picture shall remain in the High School " of Edinburgh in perpetuam rei memoriam, and that " the Magistrates and Council of the city of Edin- " burgh, as the patrons of that seminary, shall be " answerable that it is properly placed therein, agree- " ably to the object in view, and carefully protected " from all injury : Find no expences due by either of

"the parties." From this judgment, in so far as it altered the interlocutor of the Lord Ordinary, an appeal has been brought to your Lordships.

Now, my Lords, I certainly cannot go along with the finding which constitutes that alteration. The property in the picture is distinctly found to be in these claimants. But what kind of property in a personal chattel can a man be said to have, if, at the same time that you affirm the property in that chattel to be in him, you also affirm that there is in another a right wholly inconsistent with almost every one incident of property in the owner? For the magistrates and council are to have the custody of the picture; to have the possession and deposit; to put it in a place in which the others can have no access to it. To find that property belongs to A., but on condition that A. shall not have any controul over it — that it belongs to A., but A. shall have no use of it — that it belongs to A., but that B. shall enjoy it — appears most inconsistent. If such a restriction of property, so declared to be in the individual, could be established, it certainly would have required the most stringent evidence in order to sustain it.

Now, let us see what are the grounds on which the interlocutor proceeds which places this restriction upon the property. It is supposed to rest on an implied condition. The respondent says that there was an implied condition between the club and Dr. Adam, when he sat for his picture, that if he would sit for that picture they should use it in one way, and none other. This is the only ground which is stated for the putting a restriction on the use of the property. The only consistent way of stating it is, that there was a condition expressed or implied between Dr. Adam and the gentle-

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men, who must be admitted to be the owners of this picture, that they should use it in a certain way; but can it be said that there is proof of any such condition? Again, it is argued that these gentlemen, having subscribed their money, and Dr. Adam having contributed his time, which was as valuable to him as their money to them, and having undertaken the irksome labour of sitting for his picture, he may be said to have acquired a property in it, together with them. My Lords, if that be so, of course it is a joint property; but the interlocutor of the Lord Ordinary, and which is to this extent affirmed by the Court of Session, negatives that, and declares the property in the picture to be in the claimants, that is, in those who asked the doctor to sit. It affirms the separate property to be in the claimants, and consequently excludes that argument altogether.

Then we fall back on the condition. If that can be established at all, it must be extracted from one or other or all of these three matters which have been put forward in argument,—the letter of the 21st of March 1808; the act of sitting; and the letter of the 9th of August 1809. Now, I have read to your Lordships the first letter, that of 21st March 1808, and I cannot see how any part of it, followed by the only act of the party, the sitting, can amount to any thing like a condition imposed by him upon them, of using the picture in a particular way. Much stress is laid upon the expression of their wish to show some mark of their regard. What then is the mark of regard? It is having the picture painted for themselves; asking him to sit for his picture at their cost. I show my regard for a person by asking him to sit for his picture at my cost, and that I may use it as my property; that

is the most important part. I may be said to go further, if I tie myself down to use it in a particular way. "In pursuance of these resolutions, we now beg leave to request, in the name of the club, that you will do us the favour to sit to Mr. Raeburn for your picture. We are anxious to place it in the school as a memorial of our gratitude." That is the whole which is said to amount to an expression of their intention. Can it be said to be any thing more than an indication that, if he complied with their request, it was their intention at that time so to use the picture? It is a mere notification of an intention on their part, if they did become possessed of this portrait, to use it in that manner. Suppose I were to say, as I well might, to the learned counsel Dr. Lushington, Will you sit for your picture, that I may place it in my library, as an incitement to every man who sees it to pursue an honourable and useful course of professional and of public life? Suppose that he sits for his picture, and that I become possessed of it, and hang it up, and then after some years take it down, can it be said that I have broken any condition into which I had entered? that I having asked him in these kind and respectful terms, and he having so complied with my request, he, and after him his personal representatives, his next of kin, and after them again every other representative for an hundred generations, — for there is no length to which this claim may not run, according to the argument on which the judgment proceeds, — may call upon me to hang the picture up again, on the ground that when I asked the learned civilian to sit for his picture I represented that it was my intention, if he complied with my request, to use the picture in that kind of way, as being the most

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respectful to him, and the most useful to the world? If Dr. Adam, who has been influenced no doubt entirely by the respect he has for his father's memory, is authorized by the law of Scotland to bring forward the interest he has in this picture, the same principle must of course extend the same right to all generations through future ages, and they may come forward and claim in the same way. I think these observations are sufficient to show that the two first heads of evidence, to which I have adverted, furnish no support to this judgment, so far as it reverses the interlocutor of the Lord Ordinary.

Let us look, then, to the third of these pieces of evidence, which is the letter of Dr. Adam, dated the 9th of August 1809. I take it to be perfectly clear, that the representatives of Dr. Adam can stand in no better situation, in respect of this claim, than Dr. Adam stood himself; that they can have no higher right to interfere in this matter than he would have had if he had interposed during his life. After the perusal of the letter to which I am about to call your Lordships' attention, I hold it to be perfectly clear, that whatever might have been considered, whatever doubt might have existed with respect to the rights of the parties under the first part of the negotiation in 1808, the letter of these gentlemen to Dr. Adam, and the act of sitting, this letter of the 9th of August 1809 must remove all doubt. It is in these terms, addressed to one of the gentlemen:—

“ Dear Sir,—I have been so much taken up with one
 “ thing or another since I received your kind favour,
 “ that I could not sooner find leisure to acknowledge it.
 “ I feel my desire to prosecute this work (Dictionary)
 “ increased by the conspicuous manner in which you
 “ and your friends have been pleased to exhibit me to

“ public view. I went yesterday to Mr. Raeburn’s with
 “ a gentleman who was desirous to see the picture, and
 “ found it decorated with a very splendid frame, very
 “ different indeed from what it was in at the public
 “ exhibition. You have ordered every thing concerning
 “ it with so much propriety, and so far beyond my
 “ expectation, that whatever you determine with respect
 “ to the placing of it, and the inscription, will be quite
 “ agreeable to me.” Even supposing there had been
 any condition previously, even supposing they had tied
 themselves down to hang it in a particular place, sup-
 posing he had at the time acquired any right, this is an
 entire relinquishment of right of interference, if any
 such had previously existed: “ whatever you determine
 “ with respect to the placing of it, and the inscription,
 “ will be quite agreeable to me.”

There is another observation I would make, and
 which goes very strongly to show that there was no
 condition, previously to the portrait being taken, as to
 where it should be placed. The negotiation and the
 actual sitting were long before these gentlemen had
 obtained leave to hang up the picture in the school-
 room. That room was not theirs any more than it was
 Dr. Adam’s; it belonged to the magistrates. This
 negotiation took place before any permission to hang it
 there had been asked; and that fact, at any rate, goes
 strongly to negative the notion of any condition made
 between the parties, that it should be hung up in this
 particular room. I will not trouble your Lordships
 with any reference to what took place before the magis-
 trates in the year 1810; but perhaps it is not imma-
 terial to observe, that it precludes the magistrates from

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saying they had a right to claim as against these gentlemen; for a petition was presented by the gentlemen to the magistrates, to have it declared by them that the property of the portrait remained with them, and that they, or the majority of the survivors of them, may, at any time hereafter, dispose of the same as they shall think fit; and that the said portrait shall not be at the disposal of the said magistrates of Edinburgh during the survivance of any of the petitioners; and that failing them, and all provision of theirs to the contrary, the magistrates shall then preserve the same perpetuum rei memoriam. It appears that the magistrates on the 25th of April 1810 read that petition, and made an order, by which "they granted liberty to the petitioners "to place the portrait of Dr. Adam in the High "School library, on the terms and conditions before "mentioned;" that is to say, that it shall be the entire property of those petitioners, to dispose of it as they shall think fit; thus recognizing their right; and that it should not be at their, the magistrates', disposal till all the petitioners had died. This was the condition on which the proprietors of the portrait permitted it to be hung up in the High School. It is said that Dr. Adam was no party to this; it does not appear that he was; but this is consistent with that which had previously passed between the parties; and unless the magistrates could prove that this order was by fraudulent concealment of the facts obtained from them, they would be bound to deliver up the picture to the claimants; and if they had no proof of the fact of fraud having been practised upon them (for which there is no ground whatever), having delivered up the portrait, they must have left

Dr. Adam to have proceeded against the claimants as he might see fit, upon the ground of the implied condition, that condition being so far surviving for his benefit as to give him a right to interpose. My Lords, there is a case upon which a good deal of observation was made, and which I was a good deal struck with when the present question was heard at your Lordships' bar; I mean the case of *Cadell v. Stewart*, respecting the letters of Burns the celebrated poet. It is clear that the Court of Session appear to have allowed the representatives of Burns to interfere as parties in the suit, upon the ground, as stated in that report, that they had sufficient interest, for the vindication of his character, to restrain the publication of those letters. But there is a great distinction between that case and the present. There was no declaration there that the property in those letters was in the party publishing them; but the Court proceeded on the ground that letters are written on an implied confidence that they shall not be published without the consent of the writer: and they allowed the representative of Burns to interfere, for the reputation of his ancestor, to prevent the publication. Undoubtedly that is going very far; and it requires very strong arguments to support the decision, that the representative may interfere, and obtain a solatium in damages for the injury done by the publication of writings of that nature. That, however, is the ground of the decision—the sum and substance of the reported judgment. It is sufficient for me to remind your Lordships, that, whether it be a sound decision or not, it does not at all dispose of the question in this case, and for one reason, which is quite sufficient, that the judg-

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ment there rested upon no finding of property. Persons who had possessed themselves of those letters had published them contrary to the wishes, and also in violation of the rights of the parties to whom all Burns's manuscripts had been committed. It is one thing to restrain the improper use of that in which a party has no property, and another thing to restrain a party from the use of that in which you declare that he has a property. Upon the whole, I feel myself called upon to advise your Lordships to support the judgment of the 10th of June 1831 in so far as it adheres to, and to reverse it so far as it alters, the interlocutor of the Lord Ordinary of the 2d of March 1831, leaving that interlocutor of the Lord Ordinary to stand as it was originally pronounced, and which will be in substance done by reversing the judgment of the Court of Session so far as complained of; and I feel satisfied that the use which will be made of this portrait by the gentlemen, whose property it is decided to be, will be that which, in their opinion, shall do most honour to the memory of this learned and virtuous man, furthering, as much as possible, the pious intention of keeping his useful life and eminent services in lasting remembrance.

My Lords, I have made some inquiry with respect to the costs. There is no doubt that Dr. Walter Adam has interfered from a feeling highly honourable to him; and under those circumstances I am quite sure, from what I know of the appellants, that they will never suffer those costs to fall upon him. If in substance they are not to be paid by the magistrates, but by Dr. Walter Adam, I am certain that those gentlemen will not permit him to pay one farthing of the costs. I will now move

your Lordships, that the interlocutor of the Court of Session be reversed, so far as complained of.

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The House of Lords ordered and adjudged, " That the
" said interlocutor, so far as complained of in the said
" appeal, be, and the same is hereby reversed."

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RICHARDSON and CONNELL—SPOTTISWOODE and
ROBERTSON—Solicitors.

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No. 11. WILLIAM ALLEN FLOWERDEW, Appellant. — *Sir Charles Wetherell — Lushington.*

THE DUNDEE, PERTH, and LONDON SHIPPING COMPANY, Respondents. — *Lord Advocate (Jeffrey) — Keay.*

Society — Clause. — By the contract of copartnery entered into on the formation of a shipping company, it is provided that "the free profits" of the company, as they shall appear at the time of each annual balance, shall be divided among the partners in proportion to their several shares in the concern, under a provision that in fixing the amount, 25 per cent. of the free profits, as appearing at the balance, shall be set apart as a sinking fund, for upholding the number of vessels necessary for carrying on the company's trade and meeting risks, with this qualification, that if the said sinking fund shall at any time exceed 5,000*l.* no part of the profits thereafter shall be set aside so long as it remains at that amount. The directors, on striking the annual balance, previously to setting apart the sinking fund and ascertaining the net profits, made a deduction from the gross receipts, and brought it to the credit of the different vessels, on account of their deterioration within the past year. One of the partners having challenged this mode of reaching the amount of the free profits, the House of Lords affirmed the judgment of the Court of Session assolzieing the defenders.

1st Division. THE Dundee, Perth, and London Shipping Company is employed in the conveyance of goods and passengers between the ports of Dundee and Perth, and London, Liverpool, and Glasgow. This company was formed by the union of the Dundee and Perth

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Shipping Company and the Dundee and Perth Union Shipping Company, which then carried on business separately; and a contract of copartnership was executed in December 1826, and subsequent dates, but the business had commenced in July 1826. On the junction of the two companies, it was arranged that the new company should take the shipping, stores, and furniture belonging to both, along with certain heritable subjects belonging to one of them, at a valuation. The value of the shipping, stores, and furniture was accordingly ascertained to be 34,200*l.* sterling, and that of the heritable subjects 3,845*l.* sterling, making in all 38,045*l.*, which, in terms of the contract, was declared to be the capital stock of the new company. In the same article of the contract it was likewise provided that “no increase in the amount of the said capital stock shall take place, unless the same shall be previously sanctioned and approved of by a general meeting of the company called for the purpose, in manner herein-after mentioned, and on not less than one calendar month’s notice.”

William Allen Flowerdew was then a partner of the company, holding thirteen shares of the stock, and gave his consent to these arrangements, and subscribed the contract of copartnership. At this period, however, the actual or advanced capital of the company did not amount to the sum of 38,045*l.*, the amount of the declared capital. All that was actually advanced by the partners of the company was the value of the shipping, stores, and furniture, amounting to 34,200*l.* Certain heritable subjects had been likewise acquired; but they were not paid for out of contributions made by the individual members of the firm. While these

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On the 31st May 1827, the period appointed by the contract for the first balance of the books, the free profits of the preceding period amounted to 6,478*l.* 14*s.* 10*d.* During this time considerable improvements and repairs had been made upon the vessels; and on a valuation being taken preparatory to balancing, it was found that the estimated value exceeded the value which had been put upon them at the commencement of the period by 494*l.* 13*s.* 11*d.* Thus the expenditure of money on the vessels did more than counterbalance that deterioration which would have arisen from the use of the ships for the period of ten months; and the balance of

494*l.* 13*s.* 11*d.* entered into, and formed part of, the divisible profit for the period. The valuation of the shipping was made by the committee of directors appointed for that purpose, and the same method was adopted in the succeeding years. From the sum of 6,478*l.* 14*s.* 10*d.*, which had been ascertained to be the free profits of the company, 25 per cent., or 1,600*l.*, was taken off and placed to the credit of the sinking fund; and the balance was divided among the partners, according to their respective interests. The sum of the stock and sinking fund was therefore at this period short of the maximum, according to the contract, by 7,245*l.* No insurance had at this time been effected by the company against the sea risks to which the vessels had been exposed.

At a meeting of the 12th July 1827, “ it was recommended to the committee to instruct the managers
 “ to open an insurance account for the different vessels
 “ in the books of the company, to make regular entries
 “ of premiums of insurance to the debit of the vessels,
 “ and to the credit of that account, and to charge it
 “ with any losses that may occur to the shipping in the
 “ course of the year ; the residue, if any, to be divided
 “ among the partners at the stated periods of balancing
 “ the company’s books;” and this recommendation was attended to in the balance of the 31st of May 1828. The free profits of the year preceding 31st May 1828 amounted to 6,412*l.* 15*s.* 6*d.*, a sum of 840*l.* having been previously set apart on account of the deterioration of the company’s stock. The free annual profits of this year were subjected to a reservation of 25 per cent., being, in round numbers, 1,600*l.*, and the balance, 4,800*l.*, was divided among the partners according to

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On the 31st May 1829 the annual balance was struck. The net profits of the company amounted to 6,429*l.* 4*s.* 11*d.*, the sum of 1,291*l.* 15*s.* 3*d.* having been previously brought to the credit of the different vessels on account of their deterioration within the year. The free annual profit was subjected to the reservation of 25 per cent., amounting to 1,600*l.*; and the balance of 4,800*l.* was divided among the partners, according to their respective interests, at the rate of 4*l.* per share; and Flowerdew received his respective proportion of the free balance. The real capital or input stock of the company, along with the sinking fund, now 4,800*l.*, amounted to 39,000*l.*, being less than the admitted maximum by 4,045*l.* With this mode of distributing the profits, however, Flowerdew was dissatisfied, on the ground in

substance that the managers of the company were not entitled to make allowance for the annual deterioration of the stock previous to the ascertainment of the annual free profits, and the retention of 25 per cent. thereof as a sinking fund; and he, therefore, brought an action, in the Borough Court of Dundee, against the directors, and praying for an increased per-centage in shape of interest, being 1*l.* 7*s.* 11*d.* on each of his thirteen shares of the company's stock, over and above the four per cent. declared by the directors and paid to him. To this summons defences were put in by the directors, that they were bound by the terms of the contract to set aside 25 per cent. of the free profits of the company as a sinking fund; and thereafter the Court found, " That by the

" contract of copartnery on which this action is laid,
 " it is stipulated that the books of the copartnery shall
 " be balanced as on a stated day annually, and that
 " a statement or abstract of the affairs of the concern
 " shall be prepared and examined and docqueted, and
 " afterwards laid before the annual meeting of the
 " company: Finds it also stipulated that the free
 " profits of the company's trade, as they shall appear
 " at the time of each balance, shall be divided among
 " the partners, but under a provision that in fixing the
 " amount of the free profits for division 25 per cent. of
 " the amount of the free profits, as appearing at the
 " balance, shall be set apart as a sinking fund, for
 " upholding the number of vessels necessary for carry-
 " ing on the company's trade, and meeting any risks
 " which the company may have incurred, or to which
 " they may be liable, with this qualification, that if the
 " said sinking fund shall at any time exceed 5,000*l.* no
 " part of the profits thereafter shall be set aside, so

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— “ reasonable, and in the spirit of the contract, and
11th August “ according to the known usage and daily practice of
1832. “ traders, manufacturers, and shipowners, to state
— “ against their gross profits the deterioration which has
FLOWERDEW “ arisen during the year upon the instruments em-
v. “ ployed in their business ; for example, in the case of
The “ ships, to state against the gross freights the depre-
DUNDEE “ ciation of the vessel by tear and wear ; for otherwise
SHIPPING “ the apparent profits would be fictitious, the dimi-
COMPANY. “ nution in value being in many cases more than equal
“ to the produce, and so there may be in truth a loss,
“ although the accounts (when the depreciation is not
“ deducted) shew in appearance a considerable gain :
“ Finds that it is only after such deduction from the
“ gross apparent profit that the true result or free
“ profit is ascertained : Finds that the sinking fund,
“ stipulated under the defender’s contract of copartnery
“ to be maintained by retention of a portion of the free
“ profits, is not intended to be placed against the
“ natural depreciation of tear and wear ; but, as the
“ contract itself bears, ‘ for upholding the number of
“ vessels necessary, and meeting any risks which the
“ company may have incurred, or to which they may
“ be liable ;’ that is to say, it is intended to meet any
“ extraordinary event, as, for example, the total loss of
“ any of their vessels, or the destruction of their ware-
“ houses : Finds, therefore, that the defenders were
“ entitled, in making their balance or abstract, to
“ set aside from the gross profits the sums necessary
“ for covering the natural deterioration during the
“ year, the balance so appearing being the free profits,
“ and they were entitled also to set apart 25 per cent.

“ of the free profits towards the sinking fund : Finds it
 “ admitted that the balance, being free profits, was
 “ 6,429*l.* 4*s.* 11*d.*, of which they were entitled to set
 “ apart 25 per cent., that is 1,607*l.* 6*s.* 3*d.*, leaving of
 “ free profits for division 4,821*l.* 18*s.* 8*d.* : Finds it
 “ admitted that they accordingly divided 4*l.* on each
 “ share, that is in all 4,800*l.*, the balance, being
 “ 21*l.* 18*s.* 8*d.*, being carried to the next year’s ac-
 “ count : Finds, therefore, that the acknowledged divi-
 “ dend was all that the company were bound or entitled
 “ to divide, with the exception of the fraction which
 “ might have been paid on each share by the division
 “ into 1,200 parts of 21*l.* 18*s.* 8*d.* ; and the pursuer
 “ has stated that it is not this fraction which he seeks
 “ to recover. Therefore, on advising the whole case,
 “ assolizies the defenders, finds the pursuer liable in
 “ expences, of which appoints an account to be lodged,”
 &c.

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Flowerdew advocated to the Court of Session, and his case came before Lord Newton, Ordinary.

On the 4th of February 1830, a special general meeting of the company was called in terms of the contract, for the purpose of considering the propriety of increasing the capital stock of the company, at which it was resolved by a large majority, that the declared capital of the company should be increased from 38,045*l.* to 50,000*l.* A resolution to the same effect was afterwards unanimously carried at a special general meeting held on the 11th of March 1830. On the 6th of February 1830, two days after the special general meeting, Flowerdew brought an action of declarator against the respondents in the Court of Session. The summons concluded, in the first place, that it should be found and

No. 11. declared, that the “ company have not at any time since
 11th August “ the date of their said contract been, and are not now,
 1832. “ entitled to possess or hold a capital stock of greater
 FLOWERDEW “ value than 38,045*l*. nor a sinking fund of larger
 v. “ amount than 5,000*l*., nor altogether to accumulate and
 The “ keep in their hands, for the purposes of their business
 DUNDEE “ or otherwise, an amount of funds, effects, or property
 SHIPPING “ of whatsoever description, of greater value, taken at
 COMPANY. “ any one time, than 43,054*l*.” It then deduced, conse-
 quentially, that the company should be bound to divide
 any surplus which may exist among the partners, in
 proportion to their several shares. Secondly, it con-
 cludes, that in the distribution of the profits it shall not
 be competent for the company, first, to withdraw and
 set aside a part of the profits to meet an alleged or even
 a real deterioration or deficiency of the capital stock
 and sinking fund; and thereafter, and over and above,
 to set aside the stipulated proportion of 25 per cent. in
 name of sinking fund. Thirdly, it concludes that the
 profits of the trade of the company, as a shipping com-
 pany, are distinct and separate from the profits arising
 in the insurance account opened in the books, and that
 the latter neither fall within the operation of the con-
 tract, nor are subject to the reservation of 25 per cent.,
 but are distributable annually and without reserve among
 the partners. It then proceeds to call upon the company
 to make up accounts on these principles, and to account
 and pay over the balance to the pursuer accordingly.

This declaratory action came likewise to depend
 before Lord Newton; and the two processes being
 Nov. 25, 1830. conjoined, his Lordship “ advocates the cause, con-
 “ joins the process of declarator with the process
 “ of advocacy, repels the reasons of advocacy, sus-

“ tains the defences, assoilzies the defenders from the
 “ conclusions of declarator, and hail conclusions of the
 “ respective libels in the inferior court and in this
 “ court: Finds the pursuer liable to the defenders for
 “ the expences incurred in these conjoined processes,
 “ both in the inferior court and in this court, and
 “ remits to the auditor to tax the account thereof, and
 “ to report.” His Lordship added, in a note: “ The
 “ Lord Ordinary sees no objection to the first decla-
 “ ratory conclusion, which indeed is not disputed by
 “ the defenders, but a finding to that effect would serve
 “ no purpose, as it is only introduced as a foundation
 “ for the next conclusion, which does not seem admis-
 “ sible, and besides could have no application to the
 “ present situation of the company, whose capital has
 “ been increased. It appears to him that the principle
 “ on which the balance sheets of the company in pro-
 “ cess has been made up is quite correct. There is
 “ brought to account on the one side the whole existing
 “ funds of the company, consisting of their shipping
 “ and stores, heritable property, cash, bills, and debts
 “ due to them, the shipping being taken at the present
 “ estimated value, while on the other side is placed the
 “ original input stock of 34,200*l.*, the sinking fund in
 “ so far as realized, and the debts owing by the com-
 “ pany, and the difference or excess of the funds is
 “ added under the head of profits, to balance the ac-
 “ count. Now, as in the balance sheet of May 1829
 “ the sinking fund is only 3,200*l.*, the company was
 “ entitled, in terms of the contract, to retain 25 per
 “ cent. of the profits towards increasing it, seeing that
 “ after such addition it would not exceed the maximum
 “ of 5,000*l.* It is obvious also, that on these principles

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- No. 11. “ the company’s stock could never be increased beyond
 11th August “ the amount of the original input stock and the full
 1832. “ sinking fund, because, in so far as the existing funds
 FLOWERDEW “ came to exceed this amount, they must fall as free
 v. “ profits to be wholly divisible among the partners.
 The “ The result might no doubt be unfair, were the ship-
 DUNDEE “ ping or other property estimated below its true
 SHIPPING “ value, but there is no averment to this effect in the
 COMPANY. “ record, the pursuer’s objections being directed solely
 “ to the principle of accounting. As to the insurance
 “ account, the Lord Ordinary cannot see how the
 “ saving the company may have made by not insuring
 “ at all can be said to be a profit arising from a sepa-
 “ rate trade. The keeping of an account on the hypo-
 “ thetical footing that insurances had been effected at
 “ the ordinary premiums was just a mode of shewing
 “ whether or to what extent the system of not insuring
 “ was a profitable one. The Lord Ordinary has been
 “ the more disposed to give expences, that almost the
 “ whole incurred in this court have arisen since the
 “ resolutions of the meeting of 11th March 1830, in-
 “ creasing the capital to 50,000*l*. By this resolution it
 “ appears to him that the object of the present litiga-
 “ tion, and particularly of the action of declarator, was
 “ done away, and that the pursuer had, with the excep-
 “ tion of the expences, for which he was found liable in
 “ his action in the inferior court, no longer any sub-
 “ stantial interest in continuing the proceedings.”
 Feb. 2, 1831. Flowerdew reclaimed, but the Court, without hearing
 the counsel for the defendants, adhered with expences.*
 Flowerdew appealed.

* 9 Shaw and Dun. 373.

Appellant.—With reference to the contract of co-partnery, the conclusions of the action are plainly well founded. The directors could not by the terms of the contract make the capital larger, nor increase the sinking fund, by creating a new and unauthorized deduction from the free profits, the subject of the annual division. No doubt, since these actions were brought into court, it has been resolved to increase the capital of the company to the amount of 50,000*l*. This subsequent resolution, however, does not affect the present question, which must be decided by the terms of the contract as it originally existed.

The directors were therefore not entitled, upon any real or supposed ground of tear and wear or deterioration of their vessels, and over and above the expenses of full and complete repair, to retain from the fund of annual division more than twenty-five per cent. on the free profits set apart for the creation and maintenance of a sinking fund. It is a colour and evasion to pretend that they are entitled every year, before striking the free proceeds, to set aside a certain sum as the estimated amount of the deterioration of their whole stock during the year preceding. That is a mere attempt to conceal their intention of increasing the capital beyond the terms in the contract, by which the directors were not entitled to retain, either as capital stock or as a sinking fund, more than the sum of 48,045*l*.; and under any circumstances they were bound to divide the surplus.

Separatim, the amount of the insurance account should be divided annually among the partners, without being subject to any deduction on the score of a sinking fund.

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No. 11. *Respondents.* — The capital stock of the company, together with the sinking fund, has not at any time exceeded the limits pointed out in the contract. According to the sound and proper construction of that contract, the free annual profits of the company are to be ascertained by deducting from the gross annual profits the annual expence, a fair estimate of value having been previously put upon the stock, and allowance having been previously made by corresponding entries in the books of the company, for the improvement or deterioration which the stock may have undergone in the course of the year. The free annual profits must be so ascertained, although the managers or the company may have chosen, subsequently to the date of the contract, after the division of a year's profits, and without any change on the actual business of the company, to exhibit in their system of book-keeping the amount of premiums which it would have been requisite to pay for the insurance of the company's vessels, had insurance been actually effected.

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Besides, the appellant has truly no interest to follow forth the declaratory and cannot succeed in the petitory conclusions of his action. All along the capital of the company has been less than the declared capital, and of this difference the appellant could have been called on to pay his share. His present opposition is the less tenable, that he acquiesced in the principles on which the profits had been struck, and took payment of his dividend. But all doubt is removed by the company having increased their declared capital, which, by the terms of the contract, they were entitled to do.

LORD CHANCELLOR:—My Lords, the circumstances of this case are somewhat complex in their statement ; I therefore should wish to have an opportunity of looking into the printed cases before I move your Lordships to pronounce judgment.

Consideration adjourned.

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LORD CHANCELLOR:—My Lords, I have, since this cause was argued at your Lordships' bar, taken considerable pains in examining the cases, and I now state to your Lordships, that I agree in opinion with the Court of Session, affirming an interlocutor of the magistrates of Dundee, which declared the rule by which the accounts of this company were to be adjusted. The rule so laid down not being satisfactory to the appellant, he instituted a suit in the Court of Session, calling in question the judgment which had been pronounced by the magistrates; that judgment was thereby brought distinctly under the notice of the Court. It came on before Lord Newton as Lord Ordinary, and his Lordship, in refusing the application, found the pursuer liable for the expences incurred in the conjoined processes, both in the inferior court and the Court of Session; and his Lordship states, as a ground why he allows the expences to the defender, that almost all the expences incurred in the Court of Session had been incurred since the resolution of the 11th of March 1830, increasing the capital; and that the persisting in the litigation after that resolution, the effect of which was to do away with the previous litigation, and particularly the action in the Court of Session, was a line of conduct which certainly rendered the pursuer subject to the payment of the expences, which ought not to fall upon the other party.

No. 11. On a consideration of the whole of the circumstances,
 11th August my Lords, I must say that I certainly take the same
 1892. view of this case, that there was an obstinate persisting
 FLOWERDEW in litigation by the appellant, notwithstanding the clear
 v. decision against him; and, in that view of it, I think the
 The appellant must pay the costs. I move your Lordships,
 DUNDEE therefore, that these interlocutors be affirmed with full
 SHIPPING costs, which the usual means must be taken to ascertain.
 COMPANY.

The House of Lords ordered and adjudged, " That the
 " said petition and appeal be, and the same are hereby dis-
 " missed this House, and that the said interlocutors therein
 " complained of, be, and the same are hereby affirmed:
 " And it is further ordered, That the said appellant do
 " pay or cause to be paid to the said respondents the sum
 " of 225*l*. for their costs in respect of the said appeal."

BUTT — MONCRIEFF and WEBSTER, — Solicitors.

[11th August 1832.]

JOHN and LIVINGSTONE BOOTH, Appellants. — Lord No. 12.
Advocate (Jeffrey) — Lushington.

RACHEL BOOTH or BLACK and HUSBAND, Respondents.
 — *Sir Charles Wetherell — Wilson.*

Implied condition — Si sine liberis, &c. — Circumstances which were held (affirming the judgment of the Court of Session) not sufficient to exclude a grand-daughter claiming under the condition “*si sine liberis*,” from the provision contained in her grand-father’s settlement in favour of his children.

By antenuptial contract, dated the 24th of February 1770, betwixt Patrick Booth, merchant in Aberdeen, and Ann Hogg, he bound and obliged himself, “his heirs, executors, and successors,” *inter alia*, “to make payment to the children, one or more, to be procreated of this marriage, of the sum of 400*l.* sterling money; 200*l.* sterling whereof is declared payable at their attaining the respective ages of twenty-one years complete, and the remaining 200*l.* is payable at the first term of Whitsunday or Martinmas immediately following the said Patrick Booth his decease, with interest and penalty thereafter during the not-payment: And also the said Patrick Booth binds and obliges him and his foresaids to provide the just and equal half of both heritable and movable subjects, that shall be conquest or acquired during this marriage; to the children of the marriage; and in the meantime he binds and obliges him to educate and

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No. 12. “ sustain the said children, according to their quality,
 11th August “ in all necessities for their maintenance and education,
 1832. “ till their respective ages of twenty-one years com-
 BOOTH v. “ plete.” Of this marriage there were born three sons
 BOOTH. — John, Alexander, and Livingstone.

In 1783, during the subsistence of the marriage, Patrick Booth executed a trust-settlement, *mortis causâ*, of all his property, heritable and movable, in favour of his wife and two brothers, as trustees, for payment, in the first place, of all his debts and funeral expences. Then followed a declaration, that “ after complete pay-
 “ ment of all my just and lawful debts, it is my inten-
 “ tion that the whole rest and remainder of my estate,
 “ whether heritable or moveable, be considered as a
 “ residue for behoof of my said spouse and children
 “ who shall then be alive.” Powers and directions are then given to the trustees, to secure a provision to Ann Booth his wife; “ and the said capital sum being so
 “ secured and set apart, it is my will and appointment
 “ that all my children, who shall then be alive, shall be
 “ entitled to the full free residue of my whole heritable
 “ and movable estates, equally, share and share alike,
 “ without any preference to the one before the other;
 “ and in case they be all arrived at majority, or be
 “ married, at the time of my death, then I appoint my
 “ said trustees to pay their said shares to them how soon
 “ my estates can be realized and converted into cash;
 “ but in case it shall happen that some of my children
 “ shall then be major, or married, while others of them
 “ are still in minority, then and in that event I ordain
 “ and appoint the shares or portions of the children so
 “ major, and the expense of whose education I will
 “ have paid, to suffer a defalcation in favour of the

“ younger children, so as to educate them in the same
 “ manner, of which my said trustees shall be judges,
 “ my intention being to do strict and impartial justice
 “ to all my children without distinction; and however
 “ soon any of my children arrive at majority, or be
 “ married, his or her share of the free unliferented
 “ residue of my said estates shall then become payable
 “ to him or her, subject always to the defalcation above
 “ mentioned, in case the cause thereof still subsist; and
 “ providing also, that in case any of my said children
 “ shall incline, even before arriving at majority, to set
 “ up in any lawful business or occupation, &c., then
 “ and in that event my said trustees are hereby autho-
 “ rized and empowered to advance to such child any
 “ part of his or her share of the free unliferented re-
 “ sidue they shall think proper; but such advances shall
 “ not interfere with or prejudice the shares of my other
 “ children.”

Ann Booth died in 1787. In 1801 Patrick Booth on his son Alexander's marriage, made an allotment of property among his three sons as follows:—to Alexander, 1,650*l.*; to John, 1,650*l.*; to Livingstone, 1,030*l.*, but with a declaration that the difference between his and his brothers' share was afterwards to be made up to him. The particulars of these portions, to which some further additions were afterwards made, Patrick Booth entered with his own hand in a book, to which he prefixed the following note and title:—“ A clatt-book of
 “ John, Alexander, and Livingstone Booth's portions,
 “ as put by to them in July 1801, on Alexander being
 “ married, who receives all the profits himself that arise
 “ from his portion from this time; but J. and L.'s
 “ profits that arise from their share, P. Booth keeps,

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- No. 12. “ and must account to them for it when any settlement
 11th August “ takes place that they may want it up. J. and A.’s
 1832. “ portions, it’s to be observed, is about equal to each of
 BOOTHs “ them; but L.’s is far short, which must be after-
 v. “ wards made up, as will appear in each of their ac-
 BOOTH. “ counts as stated in this book.”

Alexander Booth died in 1805, leaving a widow and three children, of whom Rachel Booth (married to the Rev. Dr. Black) was one. Old Patrick Booth took charge of Alexander’s family and funds, but died in 1825, eighty-eight years of age. At his death the trust settlement was found in his repositories. By this time the trustees were all dead. John and Livingstone Booth confirmed as executors of their father, and in that character, as well as joint heirs under his settlement, they took the management of his estate. Rachel Booth survived her grandfather, and, as representing her father, Alexander, claimed an equal share of the property along with John and Livingstone, and this being resisted, she raised an action of exhibition and count and reckoning against them before the sheriff of Aberdeenshire. The proceedings, however, in the action were superseded by a summons of declarator, raised at the instance of John and Livingstone Booth, concluding to have it found that all claims competent to Alexander Booth against Patrick Booth his father, in virtue of the contract of marriage, were satisfied and discharged by the property allotted to Alexander Booth, by Patrick Booth, upon the occasion of his marriage, and afterwards, as stated in the clatt-book kept by Patrick Booth; and that the pursuers, as the only children of Patrick Booth who were alive at the time of his death, are, in virtue of his disposition and deed of settlement, entitled to the whole

free residue (if any be) of his whole heritable and moveable estates equally between them, share and share alike; and that Mrs. Rachel Booth and Dr. Alexander Black, her husband, for his interest, have no right or title, in virtue of Patrick Booth's deed of settlement, or otherwise, to any part of the residue of his heritable and moveable means and estate; and it being so found and declared, the said Mrs. Rachel Booth or Black and the said Dr. Alexander Black, her husband, for his interest, ought and should be prohibited and discharged, by decree foresaid, from further troubling or molesting the pursuers, &c.

The Lord Ordinary reported the cause on cases to the Court, and their Lordships found, "that the defender, Mrs. Booth, is entitled to that share of her grandfather's succession that would have belonged to her deceased father under the grandfather's deed of settlement referred to, and to that extent sustains the defences: Find the defender entitled to expences, &c." *

Booths appealed.

Appellants. — (1.) All claims competent to Alexander Booth under the marriage contract of 1770 were more than satisfied by the provision allotted to him by Patrick Booth in 1801, on occasion of his marriage and foris familiation, and which must be presumed to have been paid by his father, and received by him in full satisfaction of all his claims under that contract or otherwise; and the respondent, as representing him, has no claim against the appellants in virtue of any obligation

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* 9 Shaw and Dun. 406.

No 12. in that deed. The onus of showing that the provision of 1801 was not equal to the claim under the marriage contract lies on the respondent. The 11th August 1832. The circumstances of the case do not warrant such an inference. At all events the respondent cannot both claim under the settlement and under the marriage contract.

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(2.) Then comes the simple inquiry, whether, upon the construction of the settlement, taken in connection with the circumstances of the case and the situation of the parties, there is room for holding that the respondent is entitled, in virtue of the implied condition *si sine liberis*, to the share which would have fallen to her father Alexander had he lived. Now, the appellants maintain that the presumption *si sine liberis* does not apply, but is excluded by the terms of the settlement, and by the circumstances of this case; for instance, by the length of time that the granter lived after the death of his son and the birth of his grandchildren, who were living constantly under his superintendence, while he made no alteration in the terms of that deed; by the liberal provisions made by him to his deceased son during his lifetime; by the fact that the pursuers, his remaining children, continued to assist him in business, and that their portions remained in his hands, and were employed in his business down to the period of his death. Some of these circumstances singly have, in questions of this kind, been held to possess great controul; but even if not of weight separately, they must be conclusive when in unison. The rule *si sine liberis* is founded on the equitable presumption, that a parent prefers his own children to a mere stranger, or more distant relation, and therefore that his settlements must be so construed as to give effect to this

intention. The simplest case is, where a person, having made a settlement in favour of a stranger, came afterwards to have children of his own. There the substitution in favour of the stranger is held to be only conditional, in the event of the granter having no children of his own, and therefore the settlement falls by the existence of issue. In like manner where, the party having left his property to two or three children existing, another child is born to him after death, it is presumed that, had he known of the existence of this child, it would have been placed on the same footing with the others. Though the presumption did not apply with the same force to the case of grandchildren, since it might happen that a father would rather wish the share of a son predeceasing to accresce to his own surviving sons than to descend to the children of the deceased, the Roman law held that it would be expedient, sometimes at least, to extend the principle to this case also; and our law has made the rule general.

But it is not by any extension of the ordinary meaning of the word "children" in such a settlement that grandchildren are admitted to the share of their deceased parent, or upon any theory that by the word children he meant grandchildren, but because the law presumes that, had he recollected the contingency of their existence, he would have provided for it by an additional substitution in their favour. And here the great error of the respondent's argument lies. She supposes that when a court of law, in the construction of a settlement, admits grandchildren to share with children property destined to children only, it is because the word children is, in all circumstances, held to include grandchildren, and that the *conditio si sine liberis operatur*, not as an

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- No. 12. equitable insertion of a condition not existing in the settlement, but as an invariable rule of construction, arising out of the words of the deed themselves; a gratuitous assumption, unfounded in principle, and unsupported or rather negatived by decision. On the contrary, as a father, notwithstanding the ordinary presumptions arising from relationship and affection, may give his estate to a stranger in preference to his own children, and the law will refuse to supply the condition *si sine liberis*, if there is reason to believe, from circumstances, that the testator did not intend it to apply; so also will grandchildren, if his intention be manifest, be excluded. By the Roman law, if the child or grandchild in whose favour the presumption was pleaded existed at the time the settlement was made, and his existence was known to the testator, the rule could not apply to his case in the event of his being omitted. If, again, the child or grandchild were born after making the settlement, and the testator, though aware of the child's or grandchild's existence, took no steps to alter the settlement so as to include him, the law will not interfere upon a mere general presumption, opposed by the circumstances of the particular case. On the contrary, if the testator, notwithstanding the existence of the children or grandchildren for some competent time before his death, makes no alteration in the settlement in their favour, it is presumed that he neglected them from design. Such is the law of Scotland. But the presumption on which the maxim *si sine liberis*, &c. rests may also be destroyed by other circumstances; in short, by every thing that shows the testator did not and could not have intended that the grandchildren were to stand in their father's place; and such
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circumstances are amply to be found in the present case.

The decisions referred to on the other side leave untouched the general principle for the application of which the appellants contend, namely, that every case relative to the *conditio si sine liberis* is one of intention, to be tried upon its own circumstances. — Mathieson, Nov. 80, 1766, (Mor. 11,453); Stenhouse, June 15, 1787, (Mor. 11,444); Belshes, Dec. 22, 1752, (Mor. 11,361); Campbell, Feb. 21, 1723, (Mor. 11,457). *Conditio si sine Liberis*: Papinian, l. 102, de Cond. et Demon.; Cod. l. 6, t. 42, de Fidei Com. 30; Bank. 1, 9, 6; Ersk. 3, 8, 46; Yule, Dec. 20, 1758, (F. C. Mor. 6,400); Watt, July 30, 1760, (Mor. 6,401); Jarvey, Jan. 7, 1762, (Mor. 8,170); Oliphant, June 19, 1793, (F. C.); Colquhoun, June 5, 1829, (7 S. & D. 709).

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Respondents. — (1.) Whether the division or apportionment of funds recorded in the clatt-book is to be held as satisfying the respondent's claim under the marriage contract is of the less importance, as it would be superseded by the determination of the other question in favour of the respondent; for she does not in any event claim more than one third of her grandfather's succession. At any rate, it is enough to say, that there is not a vestige of ground for supposing that the division was made with reference to the obligations come under by Patrick Booth in his marriage contract. No discharge of any description was taken from the sons, nor has Patrick Booth in any way indicated an intention that the sums allocated were to be in extinction of the claims under the marriage contract. Indeed

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the whole distribution must be regarded as the effect of paternal affection, which alone appears to have regulated the amount of the donation.

Under the marriage contract, grandchildren, issue of the marriage, would unquestionably have succeeded to the share of their predeceasing parent, in that part of Patrick Booth's property which fell under the deed. Now, the trust deed of 1783 is a universal disposition, and the fair presumption in dubio certainly is, that Patrick Booth did not mean to disappoint rights which were already legally constituted over part of his property; but that, in the equal division prescribed by the trust deed, grandchildren should be admitted on the same principle as in the marriage contract. The subsequent division by the Clatt-book was not a measure to extinguish the marriage contract, but merely an anticipation of that equal succession which would accrue to the family under the joint and harmonious operation of both deeds.

The appellants say, that if the respondent claims under the trust settlement of 1783, she must abandon her claim under the marriage contract. This is true so far, that if her claim under the settlement be sustained that will include what she could have demanded under the marriage contract, her plea being for entire equality under both of these deeds. But there can obviously be nothing inconsistent in the respondent taking, under the contract, either in corroboration of the settlement, or in the event of her plea under the settlement being repelled.

(2.) The real question in this case is, Was it the testator's intention to exclude from all participation under the deed the children of such of his sons as might

predecease himself? Now, to the respondent it appears plain, that the exclusion of the families of the predeceasing children is contrary to the intention of the testator, as gathered from a fair construction of the deed. Under the general term "children," Patrick Booth meant to include grandchildren. This intention is apparent, from the circumstance that, under the appellants' construction, the deed of settlement would be inconsistent with the prior onerous contract of marriage, by virtue of which the respondent would without doubt have been entitled to her predeceasing parent's provision; while, by the respondent's construction, it is consistent with and supplemental to the marriage contract, and it was the testator's obvious intention to enlarge and not to restrict the provisions of his children. This is farther evidenced by the allocation which he made during his life by the "clatt-book." Besides, the condition *si sine liberis* is implied in family settlements, unless excluded per expressum. This condition is to be found in the Roman law, but has been greatly extended and enlarged in our practice. It is much too late to attempt to shake the doctrine on the fancied exception created by circumstances. Indeed, there are express decisions on the point, which put the question beyond doubt. The cases in the books are almost parallel with the present. The appellants no doubt also rely on cases; but when these are examined they will be found to belong to the class when presumed revocation is the plea, and not to touch the present question; and in particular it deserves notice, that the survivance of the testator, a point so much made by the appellants, occurred in those very cases to which the respondent refers, and was accounted of

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No. 12. no value. Besides, the rule "*Inest conditio si sine liberis, &c.*" has always been the successful answer to these very specialties. The appellants seem to consider that elements of proof, which when scattered are worthless, when combined are resistless; but the respondent knows of no measure by which to ascertain how many bad objections are required, when united, to make a good one. In short, the claim of the respondent may be safely based on the settlement itself. But it is also supported by the circumstances of the case, and is untouched by the facts on which the appellants rely, and on which years ago litigants have relied, but to no purpose. — *Conditio si sine*: D. l. 35, t. 102; Cod. l. 6, t. 42, 130; Magistrates of Montrose, Nov. 21, 1738, (6398); M'Kenzie, Feb. 2, 1781, (6,602); Cuthbertson, March 1, 1781, (4,279); Wallace, Jan. 28, 1807; Neilson, June 4, 1822, and authorities there referred to, (1 S. & D. 458); Christie, July 5, 1822, (1 S. & D. 543); Colquhoun, *ut supra*.

LORD CHANCELLOR:—My Lords, in this case a very important question has been raised, and it called for great attention on the part of your Lordships, not only on account of the parties concerned, but of the principles which it involved. Various decisions were adverted to as ruling the case; and I felt it my duty, after hearing the observations of the learned counsel at your Lordships' bar, minutely to investigate the authorities cited, particularly *Wallace v. Wallace*, and *Christie and others v. Paterson*. I have taken an opportunity of doing so, and the result of that investigation is, that I think the interlocutor of the Court below

right. I therefore move your Lordships that that interlocutor be affirmed, and I think it should be affirmed with costs.

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The House of Lords ordered and adjudged, “ That the said petition and appeal be, and the same are hereby dismissed this House, and that the said interlocutor therein complained of, be, and the same is hereby affirmed: And “ it is further ordered, That the appellants do pay or cause “ to be paid to the said respondents the sum of 230*l.* for “ their costs in respect of the said appeal.”

MONCRIEFF and WEBSTER—CRAWFURD and MEGGET,
—Solicitors.

[11th August 1832.]

No.13. JOHN REDDIE, Appellant. — *Lushington.* — *Deas.*
 DAVID SYME, Respondent. — *Lord Advocate (Jeffrey).* —
Kaye.

Sale.—Circumstances under which a purchaser of land, who had accepted a disposition, paid the price, and entered into possession, held (affirming the judgment of the Court of Session) not entitled to damage, on account of being disappointed in one of his alleged views for buying the land, in consequence of the terms of a missive of lease held by the tenant of the land, and the existence of which missive the purchaser averred had not been disclosed to him.

1st Division. JOHN REDDIE of Cuthil, situated in Kinross-shire,
 ———
 Ld. Corehouse. raised an action of damages in the Court of Session for breach of contract against David Syme of Cartmore.

In substance the allegations of the pursuer were as follow: —

Bounding the whole of the pursuer's lands on the south side there is a tract of ground extending to about ninety-three Scots acres, commonly called Cuthil Muir, which formerly belonged to the pursuer's ancestors, but had been sold to the late John Syme of Cartmore. After his death, his son, David Syme, advertised these lands for sale. These lands are chiefly valuable as a property capable of improvement by the formation of stripes and clumps of planting, roads, drains, &c.; and accordingly, in the valuation on which it was advertised for sale, this susceptibility was taken into account.

Having a view to these circumstances, and to obtain shelter to the pursuer's contiguous lands, he in July 1828 waited on David Wardlaw, writer in Edinburgh, agent for Syme, and, after some conversation on the subject, made an offer in writing of 1,000*l.* for the property, on receiving a regular sealed disposition thereto, but on the supposition that the lands were not under lease. Wardlaw, however, stated that the lands had been agreed to be let, whereupon the pursuer withdrew his offer for the lands, explaining that his object was to plant and improve them, which of course he could not do if they were unconditionally let to a tenant. Wardlaw then observed that there was full power reserved to the landlord for these and similar purposes in the lease to be granted to the tenant, and exhibited and read the draft of the lease, letting the lands to Daniel Campbell for nineteen years from Martinmas 1824, at the rent therein specified, and which draft contained, inter alia, the following clause:—

“ Reserving power to the said David Syme, his heirs
 “ and successors, to take off ground for planting trees
 “ within the farm, at such places as he or they may
 “ judge proper, and to search for and work coal, lime,
 “ or metals or minerals of any description, to make
 “ roads, and do every other thing necessary for carry-
 “ ing on these operations, and also for taking off
 “ ground for building whatever houses the landlord
 “ may think fit, and for gardens and other grounds
 “ adjacent thereto, to be possessed by such persons as
 “ he may think proper, and likewise to straighten
 “ the marches, or excamb any part of said farm, the
 “ tenant being allowed indemnification for the ground
 “ occupied for any of the above purposes, as the same

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No. 13. " shall be ascertained by two arbiters to be mutually
 11th August " chosen, or by an oversman to be named by the
 1832. " arbiters, in case of their differing in opinion." The
 REDDIE draft also contained clauses in relation to the houses,
 v. fences, &c., and to the cultivation of the lands, and
 SYME. other clauses restrictive of the rights of the tenant, and
 in favour of the landlord.

The pursuer being satisfied with these terms, and depending on the assurance given him by Wardlaw that the conditions contained in the draft were those alone on which the lands were let, agreed to abide by his offer. Shortly thereafter the pursuer received from Wardlaw
 30th July 1828. a letter of acceptance " of your offer of 1,000*l.* sterling,
 " payable at Martinmas, when your entry is to take
 " place; the stamp duty on the conveyance to be divided
 " according to custom, the title to be accepted of as
 " it stands, without requiring an entry with the superior, and the lease to Mr. Campbell to be confirmed
 " on the terms specified in the scroll which was shown
 " to you when here some time ago. If Mr. Williamson
 " is to make out the disposition in your favour, the
 " title deeds will be sent to him." Williamson, agent for the pursuer, wrote next day to Wardlaw on the subject, requesting that the title deeds and the scroll of the lease might be sent to him, and inquiring whether, if the tenant were agreeable, there would be any objection to the pursuer's commencing his planting operations previous to his term of entry. Wardlaw wrote Williamson in reply, with the title deeds, and observed — " The draft of the lease was sent to
 " Mr. Syme two days ago; and Mr. Syme has not the
 " least objection to Mr. Reddie arranging as to his
 " plantation whenever he pleases, and will be glad to

“ give him all the facilities in his power.” On the 6th day of August 1828 Syme wrote to the pursuer, transmitting the draft of the proposed lease, and also another draft, of the existence of which the pursuer was not previously aware, which Syme stated had been prepared by the tenant’s agent, but that in the “ material conditions they do not differ, and that the principal disagreements are as to the management of the lands, more particularly during the four last years of his possession. Perhaps the stipulations of the original draft are not quite applicable to a farm of that kind, while those of the other seem to be rather loose; but of this you are the best judge; and as I have always found the tenant perfectly reasonable and well-disposed, I am sure that you will find no difficulty in getting him to agree to any conditions which are in themselves equitable. Those in which both scrolls agree may be considered as the only ones finally settled.” This draft contained a similar clause with that in the original draft, reserving power to the proprietor, and his heirs and successors, “ to take off ground for planting trees on such places of the farm as they may think proper;” with the addition of these words, which were not in the draft shown to the pursuer, viz. “ to the extent of acres.” It also contained power to make roads and straight marches, to take off ground for building houses, with gardens, &c., as in the other draft, but differed as to the mode of cultivation. There were also other discrepancies of minor importance. The pursuer returned the draft to Syme with remarks; and Syme answered, “ I shall send the scrolls, with your memorandum, to Campbell, that he may compare them, and say that he is satisfied and agrees.”

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Thereafter the pursuer undertook to endeavour to arrange with Campbell as to the mode of cropping the lands, and in October 1828 the pursuer wrote to Syme—

“ I am sorry that I have not been able to come to an arrangement with Daniel Campbell as to the mode of cropping. We came to an understanding regarding the extent to be planted (without exactly limiting the quantity), and, with a view to please him, I had resolved to plant considerably less than I could otherwise have wished ; and, although I did not consider his plan altogether according to the rules of good husbandry, I agreed to let him have it his own way,” &c. “ I called on him to subscribe a note, containing the terms on which we had agreed, in order to prevent any objections afterwards, or any misunderstanding, and was surprised to find that he would not even agree to this way of his own, unless I would divide and enclose the lands (with expensive stone dikes) so as to suit this plan of cropping, which I declined.” The pursuer farther described that his object was to have the land planted and improved, and, without this liberty, I would not have been disposed to make the purchase, and must beg leave to refer you to Mr. Wardlaw, who will recollect, when he informed me there was a tack, I withdrew the offer I had made, until he showed me the clause reserving liberty to plant what the landlord should think proper.” In this state of matters, and as Syme or Wardlaw had said nothing to the pursuer which could lead him to suppose that Campbell had it in his power to keep possession, or to force a lease of the lands on any other conditions than those contained in the original draft exhibited to the pursuer, and referred to in the

missives of sale, the pursuer, about the term of Martinmas 1828, when his entry was to take place, paid the price of the lands, and received a disposition thereto from Syme.

The pursuer not being disposed to accede to Campbell's mode of enclosure, and trusting to the clause in the two scrolls, proceeded with his planting and improving operations, procured upwards of sixty thousand trees, and employed a great number of workmen to line off the ground and make the other preparations for carrying the object of his purchase into execution. The pursuer also (taking half the expense) agreed with a neighbouring proprietor to erect a march fence, to the extent of about half a mile, to protect the proposed plantations; but his operations were put a stop to by the following intimation, which he received from Campbell's agent:—"Kinross, 5th December 1828. Your
 "tenant Mr. Campbell has called on me this evening
 "about the improvements which you have begun at
 "Cuthil. From Mr. Campbell's missive of lease, there
 "is no liberty reserved by the proprietor to plant or to
 "interfere with the property in any way whatever;
 "and if you are still to persist, I am instructed to
 "make application to the sheriff for an interdict."
 This was the first time the pursuer was made aware of the existence of an unconditional missive of lease in favour of Campbell, and he on the same day wrote Syme, requesting a copy thereof, and also to get back the two scrolls before referred to. Wardlaw wrote in answer—"In the missive of sale the benefit of the
 "lease to Mr. Campbell was reserved to him, according to the draft of that contract, but without specifying in particular which draft was referred to; and as

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“ there were two drafts in existence, one prepared by
“ us, and another by Mr. Campbell, which is different
“ in some respects from ours, a difficulty arises as to the
“ exact tenor of the lease to be granted.” He then
says, that as there seemed some chance of a law-suit
between the pursuer and Campbell, he had advised
Syme not to interfere in the matter. The pursuer then
wrote Wardlaw, stating that the chief difficulty did not
arise from there being two drafts, to the least favourable
of which the pursuer (although not bound) might have
acceded, but from there being a secret unconditional
missive of lease in favour of Campbell, which enabled
him to prevent the whole of the improvements for the
sake of carrying on which the pursuer had purchased
the property, and stating, “ I do not wish to go to
“ law with Campbell, and have therefore, in the mean-
“ time, put a stop to my operations until I ascertain
“ if he really has such a bargain. He had till now
“ carefully concealed it from me, and Mr. Syme was
“ equally silent on the subject. I have therefore to beg
“ that you will be pleased explicitly to state if such
“ document really does exist; if it does, and has not
“ been set aside by a subsequent agreement between the
“ parties, it would be in vain for me to go into litiga-
“ tion with Campbell. I have purchased a considerable
“ quantity of plants, which will in a great measure
“ be lost if I am prevented from planting during this
“ season; and I have made arrangements for carrying
“ on other improvements on the lands, which, if I am
“ prevented from carrying into effect, will completely
“ disappoint the views I had in purchasing the pro-
“ perty.” The pursuer then reminded Wardlaw of
the statement which he made at the time of the bargain,

that the landlord had reserved full power to plant, and of the clause which he read from the draft of the lease to that effect. Wardlaw, in replying to this letter, neither denied that such were the terms of the bargain with the pursuer, nor stated whether Campbell had or had not the unconditional missive of lease which he alleged, but merely said he was sorry that he could not give the pursuer a satisfactory answer on the subject.

The pursuer's agent then obtained from Campbell's agent the following copy of the missive of lease:—
 “ 27th February 1828. Conditions, Daniel Campbell's
 “ lease. The lease to be for nineteen years ; money
 “ rent to be annually for the first five years 25*l.*, for
 “ the seven years following to be 35*l.*, and for the re-
 “ mainder of the lease 40*l.* ; to be paid half-yearly in
 “ equal portions, beginning the first payment at the
 “ term of Candlemas, immediately after the separation
 “ of the crop, and the next at the term of Lammas
 “ following, and so on to the end of the lease. There
 “ was to be a suitable tofting put upon the lands the
 “ first year of the lease ; the tenant to drive the car-
 “ riages for the sum of 14*l.* if the wood was taken
 “ from the Pottiehill or Blairadam, the stones from the
 “ nearest and most convenient quarry, and the reed
 “ from the Rhind. The fences were to be put in a
 “ good state of repair the first year of the lease, and
 “ were to be left so at the expiry thereof. The tenant
 “ was to have one hundred loads of small or lime coal,
 “ and forty load of chouse, free, at Kelty, when he had
 “ occasion for them. The above are the conditions upon
 “ which I am bound to grant a tack of Cuthil Farm
 “ to Daniel Campbell. He is not answerable for the

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- No. 13. "expense of erecting the tofting." (Signed) "DAV.
11th August "SYME." The pursuer's agent wrote Wardlaw, with
1832. a copy of this missive, in December, stating, "We
REDDIE "have not seen the original, and it will now be abso-
v. lutely necessary that Mr. Syme distinctly say how
SYME. "this matter stands;" and thereafter a great deal of
correspondence ensued between the parties. The pur-
suer maintained that there was ample evidence to show
that Syme and Wardlaw were perfectly acquainted with
the inductive reason of his buying the land; that at the
very time of the purchase they were quite aware of the
existence of the unconditional missive of lease to Camp-
bell, and on which Campbell was actually in possession;
and that the secret missive of lease was subscribed by
Syme after the draft, called Campbell's scroll, had been
prepared and submitted to him, but not agreed to, and
after Campbell had refused to agree to the terms of the
draft which was shown to the pursuer when he pur-
chased the lands as the lease agreed on between the
parties, but without effect. The defender would not
consent to annul the sale, or take back the property and
repay the price. Indeed, that would have been no com-
pensation for the breach of contract. Alleging on these
grounds that, in the purchase of these lands, he had
been deceived and misled by Syme and Wardlaw his
agent, and had suffered great loss and damage, and his
favourite plans for improving his family estate had been
disconcerted and destroyed, the pursuer concluded, that
the defender, David Syme, ought and should be de-
cerned and ordained to make payment to the pursuer
of the sum of 800*l.* sterling in name of damages, and as
a solatium for the loss and injury sustained by him,
together with expences, reserving to the pursuer to

bring a supplementary or other action against the individual creditors of John Syme or others, as jointly or severally liable to the pursuer, if he should be so advised.*

In defence Syme set forth, that by disposition of 15th November 1828 the defender sold and disposed to the pursuer “all and whole that part of the lands
“of Cuthil called Southfield of Cuthil, consisting of
“ninety-three acres and upwards, all as formerly possessed by the said David Reddie, and now by Donald
“Campbell, with the whole privileges and pertinents thereto belonging.” The disposition also contained, inter alia, the following clauses: “Which lands and
“others above disposed, with this right and disposition
“of the same, and infestments to follow hereon, I bind
“and oblige myself and my foresaids to warrant to the
“said John Reddie and his foresaids, at all hands, and
“against all mortals; and farther, I hereby make and
“constitute the said John Reddie and his foresaids my
“cessioners and assignees, not only in and to the whole
“writs, titles, and securities of the said lands and
“others, made and granted in favour of me, my predecessors and authors, and whole clauses therein contained, with all that has followed or may be competent to follow thereon for ever, but also in and to
“the rents, mails, and duties of the said lands and
“others due and payable for and furth thereof, from
“and after the term of Martinmas last, and in all time
“coming thereafter, surrogating hereby and substituting the said John Reddie and his foresaids in my

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* John Syme had died in debt, and the estate was sold by the son for the behoof of the creditors.

- No. 13. " full right and place of the premises for ever ; which
 11th August " assignation above written I bind and oblige myself,
 1832. " and my heirs and successors, to warrant as follows ;
 REDDIE " viz. in so far as concerns the writs and evidents, at
 v. " all hands and against all mortals, and in so far as
 SYME. " concerns the rents, mails, and duties, from my own
 Dec. 23, 1828. " proper facts and deeds only."

And beyond this the defender came under no obligation whatever in the pursuer's favour.

At this time Campbell the tenant was in actual possession of the farm. In the course of the communings and correspondence which took place between the parties the defender did not undertake or become bound to warrant to the pursuer that Campbell should cede possession of any part of the lands then held by him as tenant, or that he should pursue any particular rotation of cropping, or that he should in any other respect accede to or co-operate in the execution of the pursuer's alleged plans in regard to the improvement of the property.

On the contrary, it was understood on both sides that the pursuer was to stand precisely in the defender's shoes as landlord, and that in that capacity he was to have every right which might be competent to the defender himself against the tenant, but no more. The pursuer was distinctly made aware that though Campbell was in possession there had never been any concluded contract of lease executed between him and the defender, and that the terms in which such lease was to be extended were yet in a great measure under discussion. Two drafts of the proposed lease were shown to him, one as prepared by Wardlaw, the other as prepared by Campbell himself, the latter being holograph

of Campbell, and actually subscribed by him; and both these drafts were transmitted to the pursuer, and accompanied by the defender's letter of the 6th August 1828, the terms of which should have left no doubt on the pursuer's mind. The defender could, without difficulty, have arranged every matter at this time debatable between landlord and tenant, but the pursuer took Campbell into his own hands.

For nearly two months and a half the pursuer went on treating with Campbell, and during all that time the defender was incessant in his endeavours by every means to advance his views. At last the main point of dispute on which the present action hinges was conceded by Campbell, and the pursuer writes, "We came to an understanding regarding the extent to be planted." But the parties differed "as to the mode of cropping;" but even as to that the pursuer and Campbell ultimately agreed, and the point on which they at last broke off was the pursuer's not being disposed to accede to the new demand of Campbell's, that the property should be subdivided by substantial stone dikes. To this cause of dispute the defender was no party, and is not to blame, nor is liable for its consequences.

After the pursuer and Campbell had thus finally come to an open rupture, the former accepted of the disposition from the defender, and by virtue of that disposition entered into possession of the property, having first paid unconditionally, and without any deduction or qualification whatsoever, the full stipulated price. The pursuer, having thus got into possession, now attempted to carry his plans into execution in spite of Campbell. The result was resistance on the part of the latter. Whether in this resistance Campbell was right or wrong

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No. 13. in law, the defender was under no obligation to stand
11th August between him and the pursuer. But it seems plain that
1832. this misaive was never intended nor understood to
REDDIE supersede a formal lease, or to embody the whole detail
v. of the mutual obligations between landlord and tenant,
SYM. but was a mere memorandum of the primary conditions
of a verbal lease previously concluded between the
parties, and under which Campbell was at that moment
and had for years been in possession.

Accordingly Campbell is under a legal obligation to
subscribe a lease as the pursuer's tenant, in terms, at all
events, not less favourable for the pursuer than those
contained in Campbell's holograph draft; and it is the
pursuer's own fault if he fail to enforce the execution of
that lease, and to compel implement of its stipulations,
whether in regard to his right of planting the property
or otherwise. Nevertheless, to avoid dispute, the de-
fender twice formally offered to annul the sale, take
back the subject, and repeat the price with interest; but
this was expressly declined.

The parties repeated their statements, in the shape of
revised condescendence and answers, but still remained
entirely at variance as to the facts of the case. The
case was then transmitted de plano to the Jury Court,
but there the defender moved that the case should be
re-transmitted to the Court of Session to have the law
on the question decided, on the facts as presented, and
which, the defender maintained, barred the action. Being
transmitted, cases were ordered by the Lord Ordinary
and avizandum made to the Court.

On the case being advised, LORD BALGRAY observed—
“ I never saw a clearer case, nor a looser transaction.
“ I was at first a good deal misled by the statement

“ which is made on the part of the pursuer. If it had
 “ so happened that the seller of the lands had come to
 “ the purchaser, and said, ‘ Here is a scroll of a lease
 “ of the lands, which I take you bound to confirm;’
 “ and if it had afterwards turned out that there existed
 “ a different lease, this would have been a case of gross
 “ misrepresentation. But I never saw a looser trans-
 “ action. I don’t know which draft it is that is referred
 “ to in the missives. A squabble took place between
 “ the tenant and the purchaser, so that the latter must
 “ have known how matters stood; and yet he goes on
 “ and accepts of the disposition, and pays the price,
 “ without saying one word by way of complaint as to
 “ being deprived of the power of planting; and how
 “ can he now go beyond the disposition and come upon
 “ the seller?” LORD PRESIDENT — “ I am of the
 “ same opinion.” LORD CRAIGIE — “ The only dif-
 “ ference between the pursuer and the tenant was as to
 “ the mode of cropping. They had none as to the
 “ planting.” Thereafter the Court sustained the de-
 fences, assoilzied the defender from the conclusion of
 the action, and decerned with expences.*

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Reddie appealed.

Appellant.—(1.) The pursuer having purchased the lands in question on the express understanding and condition that the lease to be granted to the tenant was to be in terms of the draft shown to him at the time of the purchase, and referred to in the missives of sale, the defender was bound to implement that bargain; and having failed to do so, he is liable in damages to the

* 9 Shaw and Dun. 413.

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pursuer. The reference in the missives of sale to the draft of a lease shown to the pursuer makes it competent for him to prove, *pro ut de jure*, what were the terms of the draft so shown, and generally gives him right competently to introduce parole testimony to explain or explicate the terms of the contract; and the payment of the price, and acceptance of that disposition by the pursuer, formed no bar to his action of damages, nor prevents him from going back on the previous communings and correspondence, as showing the terms of the contract between the parties. — Ferrier, March 9, 1823 (1 Shaw's Ap. Ca. p. 455); Stewart, May 15, 1829 (S. & D.); M'Lean, June 23, 1757 (F. C.)

(2.) This is not an *actio quanti minoris*, but a claim arising from the breach of mutual contract, the terms of which were perfectly understood by both parties at the time when the same was entered into, and the pursuer's part of which has been duly implemented. — See cases cited above.

(3.) The pursuer was not bound, in the first instance, to have discussed with the tenant the validity of the secret missive of lease. It is the defender alone with whom the pursuer has to deal.

(4.) Suppose there had been, as there was not, a restitution in integrum offered: Cases of *restitutio in integrum* have been merely those of simple error, but not where there was fraud in the conception of the contract, and concealment and deceit in the execution of it. Repayment of principal and interest is no restitution. The Court below, in the reason given for *assoilzieing* the defender, forgot that this was a question of relevancy, in which the averment of the pursuer must be assumed as true. The Court admitted that if this had been a case

of gross misrepresentation, the pursuer would have been entitled to be relieved; but the pursuer offered, but was not allowed, to prove that very charge. The pursuer was not bound to give up the bargain, nor to forego his reasonable prospects of profit from the purchase of the lands in question. The defender was, besides, liable to the pursuer for all loss and damage which the pursuer has sustained by the non-implementation of the contract on the part of the defender, and likewise in a solatium to the pursuer for the disappointment of his views and plans.

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Respondent. — (1.) There is no ground whatever for any claim of damages against the defender. He has duly implemented every obligation incumbent on him as seller of the subject in dispute. The disposition granted by the defender to the pursuer conveys the subject as possessed “now by Donald Campbell,” of course subject to all Campbell’s rights as tenant. The defender nowhere becomes bound to warrant, either that the pursuer should be enabled to effect a certain extent of planting, or that, in the face of any right competent to the tenant, he should be entitled to plant at all.

It matters not what has been the pursuer’s purpose or expectation, or even the defender’s mistaken impression, for the disposition contained no stipulation on the defender’s part. The rule of law is *caveat emptor*. The pursuer had it in his power to satisfy himself from the tenant as to the extent of his supposed rights, and indeed did come into personal contact with the tenant, regarding the very point now in dispute. If he proceeded, and proceeded erroneously, he has done so at his own risk. The pursuer cannot be permitted to go

No. 13. back to the written correspondence and verbal communings of the parties, and out of these informal and imperfect communications to make a contract different from the contract ultimately executed. — Gordon, June 15, 1815 (F. C. and 1 Bligh, 287); (1 Shaw's Ap. Ca. 317); 2 Barn. & Cres. 627.

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(2.) The claim insisted in by the pursuer is of the nature of the *actio quanti minoris*, which has no place according to the law of Scotland. — Ersk. III. 3. 10; Gray, 23d Jan. 1801 (Mor. Voce Sale, App. No. 2); Hannay, 26th Jan. 1785 (Mor. 13,334); Inglis, 27th June 1788 (Mor. 13,335); Gray, 23d Jan. 1801 (Mor. Sale, App. 2.)

(3.) The pursuer is in no view entitled to insist against the defender in the first instance, and while he has taken no legal measures to compel implement of the obligations incumbent upon the tenant.

(4.) At all events the pursuer could ask no more than a *restitutio in integrum*, and that was offered to him, and rejected.

If there has been error in *essentialibus*, there is no contract, and matters fall back to their original state. The pursuer cannot make out a case of fraud, and most assuredly there is not upon the record averments to afford substance and relevancy to such a charge. Even, therefore, were it to be held, in the face of the disposition which the pursuer has accepted, that he has unwittingly entered into a contract which neither party meant that he should enter into, it is quite manifest that at the utmost he is entitled only to restitution, and that if he reject that he is entitled to nothing. — See authorities already cited.

LORD CHANCELLOR:— My Lords, I took time to consider this case farther, because I was desirous of looking into the papers to see whether there had been really an offer to rescind the bargain, and take back the lands. That is positively stated, and there was created great suspicion in my mind that such an offer, in fact, had been made. All that the appellant, under such circumstances, could have required, was a real and substantial restitution to his former situation. I am satisfied that was offered to him; and upon a full view of the circumstances of this case, I am clearly of opinion that the interlocutor of the Court of Session is correct, and that it ought to be affirmed, with costs.

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The House of Lords ordered and adjudged, “ That the
“ interlocutor complained of be, and hereby is affirmed,
“ with costs.”

JACKSON — MONCREIFF and WEBSTER, — Solicitors.

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No. 14. ARCHIBALD HUNTER, Appellant. — *Attorney General* (Denman) — *Lord Advocate* (Jeffrey).

ALEXANDER DUFF and others, Trustees of the deceased Major Duff, Respondents. — *Lushington* — *T. H. Miller*.

Circumstantial — Expenses. — Circumstances in which it was held, affirming the judgment of the Court of Session, that the interest on a bond was paid; that one bill was prescribed, and another retired; and that the trustees of a party, alleged, but not proved to have purchased pictures, was entitled to return them to the seller. But the interlocutor of the Court below was altered in part as to costs.

2d DIVISION. ARCHIBALD HUNTER of Upper Baker Street, London, in August 1829, raised an action in the Court of Session against the trustees of the late Major Duff of Milton, and concluded for payment of 600*l.* sterling, due on an English bond dated the 30th of August 1821, with interest from that date; for 478*l.* sterling, as the contents of an acceptance by Duff to Hunter, which fell due on the 2d of September 1822. This bill is dated London, 30th August 1821, was drawn by Hunter, residing in London, accepted by Duff, 185, Piccadilly, and made payable to Hunter twelve months after date. The summons also concluded for payment of 200*l.* sterling, as contained in another acceptance by Duff to Hunter, which fell due on the

28th of May 1826, with interest upon both these sums; for the sums of 1,050*l.* and 105*l.* sterling, represented to be the price of certain pictures alleged to have been purchased from Hunter by the deceased, with interest from the 28th of August and 4th of October 1822, and for expences of process. The trustees maintained that the interest had been paid on the 600*l.* bond till the time of Duff's death, and that certain partial payments had been received by Hunter, which fell to be applied in extinction of the principal. Afterwards, however, upon production of the correspondence recovered under diligence, the trustees, who were previously unacquainted with these affairs, became satisfied that Duff had not intended to ascribe these payments in extinction of the principal of the bond. They abandoned, therefore, these deductions, and admitted the bond to be due, with interest, from their constituent's decease. The other claims they disputed in toto.*

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The Lord Ordinary found, in respect to the bond for 600*l.* libelled, that it is not now disputed that the principal thereof is due, with interest thereon from the period of the death of Major Duff, viz. April 1828; and therefore finds the defenders, as trustees libelled, liable for the said principal and interest, and decerns accordingly. But in regard to the interest on the said bond prior to the death of Major Duff, finds it sufficiently appears, from the writings and admissions in process, that the said interest was paid, or the claim for the same extinguished, by payments made in each year

March 1, 1831.

* The respective statements of parties were in the usual shape of revised condescendence and revised answers, statements of facts and answers, counter statement of facts and answers, with additional statement of facts for the defenders, and answers for the pursuer.

No. 14. by Major Duff to the pursuer, and that the same did
 11th August not constitute an arrear of interest due between the
 1832. parties ; therefore, in respect to the same, assoilzies the
 HUNTER. defenders, and decerns. In respect to the bill for 478*l.*,
 v. finds that the same has fallen under the sexennial pre-
 DUFF scription of the law of Scotland ; and in respect no
 and others. offer is made to prove that the sum therein is due by
 the oaths of the defenders, therefore, in regard to this
 bill, assoilzies the defenders, and decerns. In respect
 to the bill for 200*l.*, finds it proven by the correspond-
 ence in process, and admitted to be genuine by the
 pursuer, that the same was retired with money remitted
 by Major Duff for that purpose ; and, therefore, in
 regard to this bill, also assoilzies the defenders, and
 decerns. In respect to the price of the pictures libelled,
 finds it appears that the same were sent to Major Duff,
 not in consequence of any prior contract of sale, but,
 at the farthest, in the hopes that a sale of them might
 be made ; finds no evidence that any such sale ever
 was completed ; and therefore finds it unnecessary to
 decide in regard to the defenders plea of the quinquen-
 nial prescription ; and in respect to the defenders offer
 to restore the said pictures, assoilzies them from that
 part of the conclusions of the libel, and decerns : Finds
 the pursuer liable to the defenders in expences, of
 which appoints an account to be given in, &c.

The case was taken by a reclaiming note before the
 Second Division ; and their Lordships, having advised
 June 9, 1831. the cause, refused the desire of the reclaiming note,
 and adhered “ to the interlocutor submitted to review,
 “ with this explanation as to the pictures, that these are
 “ actually to be restored as offered by the defenders,
 “ and, when that condition shall be fulfilled, adhere to

“ the interlocutor in omnibus ; find the defenders entitled to expences since the date of that interlocutor, and decern ; appoint an account to be given in,” &c.* And these expences were afterwards modified and decerned for.

Hunter appealed.

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Appellant. — The bond is a regular and a probative document of debt; and it is not instructed by, and does not appear from, any writings or admissions in process, that the interest on the bond, prior to the death of Major Duff, was paid, or the claim for the same extinguished by payments made in each year by Major Duff to the appellant. The debt constituted by Duff's acceptance for 478*l.* is an English debt, and therefore does not fall within the operation of the sexennial prescription of bills of the law of Scotland. — Delvalle, 9th March 1786, and York Buildings Co., 14th February 1792 (Mor. 4,525 and 4,528). Holding the debt to be English, the statute of limitations is excluded by certain legal procedures taken in England; and even were it to be held that the debt is liable to be affected by the Scotch law of prescription, the respondents, in the particular circumstances of the case, are barred, personally exceptione, from stating any such plea. At Duff's death the prescription had not run, and the trustees by their conduct misled and put the appellant off his guard. — Douglas, Heron, and Co., 1st March 1793 (Mor. 11,045). As to the bill for 200*l.*, it is a regular probative document in favour of the appellant, which the respondents are legally bound to pay, unless they

* 9 Shaw and Dun. 703.

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prove *habili modo* that it has been already paid; but it is not proved by the letters in process, or otherwise, that it was retired with money remitted by Major Duff for that purpose. The pictures were in 1822 sold to Duff at the prices stated, and duly delivered to him: at any rate, if the evidence already in process of the amount of the price were to be held not sufficient to instruct that fact, further evidence of it has been offered. It is quite plain, that, after the pictures have been kept and used, first by Duff for a number of years, and, since his death, by the respondents, mere restoration of the pictures is not, in any view, what the appellant is bound to accept. The judgments on the merits of the cause, in respect of which the judgments for expences were pronounced, being erroneous, on the former being reversed, the latter, as an accessory thereto, ought also to be reversed. At all events, the expences ought to have been less, inasmuch as the respondents, till the action was raised, denied the appellant's claim in toto, which denial rendered an action necessary; and since, even in their defences to the action, they maintained that part of the principal sum in the bond had been paid, which plea they afterwards abandoned, though not till after expence had been incurred.

Respondents.—Annual payments, proved to have been made by Duff to the appellant, must be held to have extinguished the accruing interest on the bond; and it is the principal only of the bond, with interest since Major Duff's decease, that remains due to the appellant, and this the respondents do not dispute. The acceptance for 478*l.* is prescribed by the law of Scotland—the law of the country applicable to the case;

and the appellant had never reason to expect that the respondents would pay it; and the bill for 200*l.*, being proved to have been retired by Duff's funds, is paid and extinguished. The claim for the price of the pictures is groundless. There was no complete sale. If there had been, the quinquennial prescription had run. The appellant will get ample justice if the pictures are restored to him. The respondents are merely trustees, and had no personal knowledge of these matters. The moment they were satisfied that there had been no partial payment, they gave up that defence. Having stated it at all, put the appellant to no additional costs.

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LORD CHANCELLOR:—My Lords, I have taken time to look into this case, and I am satisfied that, except as to the matter of costs, there is no ground for altering in any respect the interlocutors appealed from. But with respect to the costs, there has undoubtedly been a slight mistake: the costs have been given generally. Up to a certain point it was clear that the pursuer was correct in his demand, because the present respondents gave in upon that point, and put a stop to any further litigation; but the costs ought not to have been allowed to the defender beyond that point, but, on the contrary, to the pursuer; and though that would not of itself have been a ground of appeal, yet there was substantial matter, independently of the question of costs, that has brought the whole case before your Lordships really and not colourably; and it is perfectly competent to your Lordships to alter the interlocutor complained of in respect of costs, although in no other respect is it necessary it should undergo alteration. I

No. 11. am anxious to guard against being supposed to assent
11th August to any proposition like that of it being competent to
1832. appeal upon a question of costs. If there is an appeal
HUNTER merely upon costs, it cannot be entertained for a mo-
v. ment; if the appeal from the body of the decree were
DUFF colourable, and prosecuted, not for its own sake, but for
and others. the purpose of ushering in an incompetent appeal upon
costs,—in that case, too, your Lordships would reject it
as an incompetent appeal; but where there is a bonâ
fide ground of appeal upon the merits, then, it being a
competent appeal upon the merits, it may be made the
ground of reversal or alteration of the interlocutor in
the other respect of costs. The judgment I should
advise your Lordships to pronounce would be, to affirm
the interlocutor complained of, but, in respect of the
costs given, to reverse such part as relates to the costs
up to the admission respecting the bond, and to give
the costs to the pursuer, the present appellant, up to
that point. This will make it necessary there should
be a remit, as your Lordships have no means of taxing
the costs below; but in order to avoid that expence,
the parties may try to agree on the sum, and, before
we order a remit, suggest a sum that may be inserted
in the order. I do not move to affirm this judgment,
with costs, for other reasons; therefore the judgment
will be to affirm the interlocutor, but alter that part
relating to the costs, and to allow to the appellant
a certain sum that the parties may agree upon for
costs which up to that point may have been incurred;
that will save the parties the expence of going back to
the Court of Session. If they cannot agree upon a sum,
there must be a remit, with an instruction, and the
Court will then tax the costs.

Parties not having agreed, the House of Lords ordered and adjudged, "That the interlocutors complained of be, " and the same are hereby affirmed, except in so far as " they, or either of them, find the expences of process " herein-after specified due from the pursuer to the de- " fenders : And with respect to such expences, it is further " found and declared, that the pursuer ought not to have " been charged with any expences of process up to the " date when the revised answer for the defenders to the " revised condescendence for the pursuer was put in, as " the same appears in page fourth of the appellant's printed " case ; but, on the contrary, expences ought to have been " allowed to the pursuer of the proceedings up to that " date : And it is further ordered, that the cause be re- " mitted back to the Second Division of the Court of " Session, to vary the interlocutors in this respect, and to " do further what shall be just thereupon."

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CALDWELL and SON — MONCRIEFF and WEBSTER, —
 Solicitors.

[11th August 1832.]

No. 15. ARCHIBALD SCOT, Appellant. — *Lushington*.KER and JOHNSTON, Respondents. — *Lord Advocate*
(*Jeffrey*).

Appeal — Process — (competent and omitted.) — Held incompetent to have an appeal, previously disposed of, reheard, on the ground that an interlocutor in the cause had been omitted to be appealed from, and had not been allowed to be considered at the previous hearing.

Sequestration. — Can a sequestration issue at the instance of some of the partners of a bank against one of their partners, on a debt due by him individually to the company?

THE facts of this case will be found in 5 Wilson and Shaw, 9th December 1830.

House of Lords. The appellant afterwards petitioned the House of Lords, setting forth, inter alia, That the petitioner, in March 1829, presented his petition of appeal to their Lordships against the interlocutor of the Lord Ordinary on the Bills of the 20th July 1827, in which his Lordship, having considered the petition, with the writs produced, granted warrant for citing the petitioner to appear, within ten days after citation, to show cause why sequestration should not be awarded against him; and the interlocutor of the First Division of the Court of Session, of the 11th December 1828, whereby their Lordships, before further procedure, appointed the petitioners (Ker and Johnston) to give in a minute, stating the grounds upon which they aver that the

respondent (the present petitioner) was a bankrupt at the period of the petition for sequestration being presented to the Court; and the interlocutor of the same division, of the 20th February 1829, whereby the Lords, having advised the petition for sequestration, with the revised cases, &c., repelled the objections stated to the application, sustained the title of the petitioners, and therefore sequestrated the whole estate and effects of the said Archibald Scot, in terms of the statute, appointed the creditors to hold two meetings within the Crown Inn, Langholm, &c. to choose a trustee, &c. : That the sequestration so awarded against this petitioner was at the instance of the Leith Banking Company, of which the respondents (Ker and Johnston) design themselves managers, and of which the present petitioner himself was, at the time in question, (as is expressly charged and admitted by the respondents in their pleadings,) one of the partners; and such sequestration was founded upon a debt of 1,011*l.* 15*s.* 7*d.*, alleged to be due by this petitioner individually to the banking company, that is to say, by a partner of the company to himself and the other partners of whom that company consisted: That this petitioner is advised, that in point of law no sequestration could be awarded against this petitioner, or can legally subsist, founded upon a debt under such circumstances, which debt, if due at all, being due from this petitioner individually to himself and the eleven other persons constituting the partnership in question, the sequestration is, in fact, a sequestration by this petitioner against himself: That the appeal came on for hearing on the 6th December last, but upon such hearing this petitioner was shut out from the benefit of the above-mentioned objection, because it then appeared

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- No. 15. that a certain other interlocutor in the said case had not
11th August been included in the petition of appeal, which was pro-
1832. nounced by the Court of Session upon the 2d December
Scot 1828: That the interlocutor so omitted was in the fol-
v. lowing words; "The Lords, having resumed consider-
KER ation of the cases given in by the parties, repel the
and another. "objection proponed to the title of the petitioners, and
"appoint the cause to be put to the roll for advising:"
That the agent in Scotland of this petitioner, by whom
the said petition of appeal was prepared, being since
dead, this petitioner is unable to ascertain whether such
an omission to the said interlocutor in his petition of
appeal arose out of inadvertence, or proceeded from an
impression in the mind of the agent that it was not
necessary to notice such interlocutor, inasmuch as the
subsequent interlocutor above mentioned, which em-
braced the matter of the respondent's title, was
included in the petition of appeal: That it further
manifestly appears, upon reference to the interlocutor
so omitted, and to the other proceedings in the cause,
that the objection to the petitioner's title, repelled by
the interlocutor so omitted, related only to the circum-
stance of the said banking company not having com-
plied with certain requisites of the statutes 7 Geo. 4,
cap. 46 and 67, and that the objection so repelled had
no connection whatever with the particular objection
herein-before stated: That this petitioner is only desirous
of obtaining substantial justice and an equitable consi-
deration of his case: That, on a fair accounting, it will
be found he owes nothing to the banking company:
That Scotch banks never discharge, whereby, after all
this petitioner's property shall be taken from him, he
will be left for the remainder of his life in the power

of the respondents: That by the sequestration (disclaimed by the other creditors) the estate will be involved in great expense: That all the petitioner's property is already secured, and he is willing to execute any further deeds in security, to his creditors: That under such circumstances the petitioner humbly submitted, that it would be an act of great hardship upon him if he should be subjected to the process of sequestration and all its injurious consequences; whilst it is clear that the respondents are not legally entitled to issue such process against the petitioner. The petitioner therefore prayed their Lordships, that, under the peculiar circumstances of this case, their Lordships would be pleased to recal the judgment pronounced, and to permit the petitioner to amend his petition of appeal, by inserting therein the said interlocutor of the 2d December 1828, and to order that the said appeal may thereafter be re-heard generally, or that their Lordships will be pleased to order the said appeal to be re-heard upon the particular objection above stated, and any others connected therewith, and to make such alteration in the said judgment as to their Lordships upon such re-hearing shall seem just; and that the petitioner may be heard by counsel upon the matter of this petition at their Lordships' bar, or before their Lordships' committee of appeals; and that further proceedings in the said process of sequestration in the Court of Session may in the meantime be stayed, or that their Lordships will be pleased to make such further or other order, &c. &c.

The petition was referred to the appeal committee, and thereafter the competency of the application was directed to be argued, and was argued at the bar. The

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No. 15. leading arguments are stated by the Lord Chancellor in moving judgment.
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 9th July 1832.

LORD CHANCELLOR:— My Lords, in this case I apprehend there is so little doubt, that I should be disposed to advise your Lordships immediately to decide upon the present application, but that I think it may be desirable to look into the practice of the Court below, under the 6th George IV., cap. 120, and ascertain to what degree there has been a strict observance of the rules laid down there; and on that ground chiefly it is that I shall propose to your Lordships to postpone the consideration of this application. It appears to me, on the best consideration I have been able to give to the case, that if this House had heard it over again, and the appeal had included the interlocutor which is referred to in the petition, I should have felt it impossible to do otherwise than advise your Lordships to affirm the judgment of the Court below. The question, however, which is raised by this petition, is an extremely important one: it may be so in its result. I do not think it is likely that I shall alter my opinion; but to put it beyond even the possibility of the party being shut out from any remedy to which on the most mature consideration he may be considered to be entitled, I shall postpone finally craving your Lordships to proceed to judgment until I shall have considered the merits of this case, independently of the question now raised, which was never raised in the Court below, never brought under the notice of the judges who disposed of that case in the Court below, but for the first time presented at your Lordships' bar. I have already said what my opinion is; but for the purpose of

giving any chance, if chance there may be, of my altering that opinion, I shall now advise your Lordships to postpone dismissing this petition until I have looked further into the case.

Consideration postponed.

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LORD CHANCELLOR:— My Lords, an application was made to this House to re-hear this case, which had been already disposed of, and in consequence of this application your Lordships heard at the bar one counsel on each side. During that argument, a point was made at the bar, which had not been taken in the Court below, and which, upon the hearing of the cause, it was contended the party was not allowed to raise, in consequence of a certain interlocutor in the Court below not having been appealed from. That interlocutor was pronounced upon an objection taken to the title to pursue, and it over-ruled the objection so taken to the pursuer's title. That interlocutor was unappealed from. When the case was heard upon the petition for a re-hearing, it was argued upon the ground of the party being shut out from obtaining justice. Upon that occasion several matters suggested themselves. One was stated, namely, an objection arising upon the 11th section of the Scotch Judicature Act, in respect to the points to which the argument should be confined; and it appeared that an inquiry should be made, whether, in the practice that had prevailed since that act was passed in the courts in Scotland, there was such a deviation from the provisions of that act as enabled the parties to be let into fresh matters, after the record had been closed? I have made that inquiry, and obtained that information, and

No. 15. I am satisfied with the result. I am satisfied that no deviation from that act has been sanctioned by the practice, and that no laxity has been introduced in the practice of the Courts upon that subject, where the party has not in due time taken an objection. My Lords, this would have been fatal to this application, to be let in upon the present occasion, had that provision of the statute applied to a case like the present, which arises out of a sequestration issued by some of the partners of a banking house against another partner of the same house; but it is perfectly clear that this objection upon the 11th section of the statute does not apply to that proceeding. The other ground of objection is one taken by myself when the question first came on, and which was afterwards insisted on when it was in the second instance before your Lordships, and most ably argued at the bar. I have the more confidence in it, because, upon consulting most learned persons in the Court below upon the matter, in order to prevent anxiety in my mind, in advising your Lordships upon the decision of the question, I found that the objection then taken, upon its being mentioned to those learned persons (without any communication of the objection having been taken on the part of any of your Lordships), had struck themselves originally as being fatal to the present application; and that is the old established ground, which there is no getting over in this House,—either that the Court below dealt with that objection to the pursuer's title, in which case they repelled it; or if it is alleged that it was not an objection dealt with by the interlocutor, then it is not repelled; but still it was a competent objection, and omitted by the party. It was competent to the party to take the objection—it

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was omitted ; and upon that ground, if upon no other, emphatically in this place the objection ought not to be allowed to be taken ; and when it was taken here, it was fit it should be met by that answer. I have the satisfaction of knowing that the same learned persons whom I consulted upon the practice of the Court, and whose opinion I have quoted upon the question of the competence of the objection in this stage, are of opinion that the objection founded on the circumstance of the sequestration issuing at the instance of some of the partners of a bank against one of their partners would not, according to the Scotch law, have availed the party, even if taken in time in that Court. That is a very satisfactory circumstance ; but if it had been otherwise, and it had been an available objection, still, upon the grounds I have mentioned, there is sufficient to preclude the party being considered entitled to the relief sought. I therefore move your Lordships that the prayer of the petition be not complied with.

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The House of Lords ordered and adjudged, “ That the prayer of the petition be, and hereby is refused.”

GORDON — MONCRIEFF and WEBSTER, — Solicitors.

[13th August 1832.]

Ex parte.

No. 16. WILLIAM EWING, Appellant. — *Lushington*.

WILLIAM WALLACE, W. S., Respondent.

Process (competent and omitted) — Expences.— A party who had allowed the agent of his opponent to obtain decree in the Jury Court for expences in his own name, found barred (affirming the judgment of the Court of Session), by the exception of competent and omitted, from suspending a charge, on the allegation that the agent had no attorney licence for the period when the expences were incurred.

Decision OVER-RULED.

Held, that the case of Robertson v. Strachan, 9th June 1826, 4 Shaw and Dun., p. 772, is ill decided.

1st Division.

Lord Newton.

WALLACE was agent, from April to December 1827, for Wight, in an action in the Jury Court against Ewing, and obtained decree there, in foro contentioso, with expences. These expences were taxed in the Jury Court at 9*l*. 7*s*. 9*d*., and decree taken for them in the name of Wallace. Being charged on this decree, Ewing presented a bill of suspension, on the ground that the charger had no attorney licence for the period during which the account was incurred. Lord Cringletie refused the bill, adding in a note, "The Lord Ordinary
 " remembers that in the Jury Court there was much
 " discussion relating to this and other accounts of
 " expences. Then was the time for the complainer to
 " have made his objections, but he omitted it, and the
 " respondent obtained his decree. Even, therefore, if
 " the respondent had not obtained his certificates from
 " the stamp office, which he has, the objection comes
 " too late. It is competent and omitted." But a

April 3, 1829.

second bill was passed by Lord Corehouse.* On the expedite letters coming before Lord Newton, his Lordship suspended "the letters simpliciter, reserving any claim for the expences charged for, which may be competent to Archibald Wight; finds the suspender entitled to his expences, both in the process and in the bill chamber; allows an account thereof to be given in, &c. Note:—The Lord Ordinary does not hold the extrajudicial offer to pass from the charge as conclusive of the merits of the case, seeing the offer was accepted of under the conditions on which it was made; but he thinks the merits are with the suspender. The objection of competent and omitted was ineffectual in the case of *Robertson v. Strachan*, 29th June 1826, where a charge was suspended in circumstances similar to the present; and the Lord Ordinary is not aware of any distinction betwixt the proceedings in the Court of Session and those in the Jury Court, as to taking out decrees for expences in name of the agent, which should render that decision inapplicable as an authority to the present case. He has made a similar reservation to that which was inserted in the Court's interlocutor in the case of *Robertson*."

The charger reclaimed to the Court.

LORD GILLIES.—In *Strachan's* case the exception of competent and omitted seems to have been applicable as well as here, yet the Court did not hesitate to suspend. If, therefore, I felt satisfied of that being a good decision, I would suspend here also. But though

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* A correspondence ensued, in which the charger offered, in order to avoid litigation, to give up the amount of his profits on the account (*5L 12s.*); and he afterwards offered also to give up the whole claim, and to pay the expence of the second bill of suspension, under deduction of his expences of the answers to the first bill. The suspender declined the offer, unless the charger would pay the expense of both bills.

No. 16. the charger might have pleaded the exception in Robertson's case, it does not appear that he did so. That exception, however, is pleaded here, and it is a most important plea in the law of this country. I feel a doubt about the implicit adoption of Robertson's case as a precedent, since it appears this plea was never stirred in it. Though the case is not free from difficulty, since Ewing founds on the statute as cutting down the title of Wallace, yet I am disposed to alter the interlocutor of the Lord Ordinary, because I think Ewing is barred from stating this objection to the title. The exception of competent and omitted covers objections to the title as well as to the merits of the action to which it applies. Ewing could have urged his objection in the Jury Court, where it must have received effect, if well founded. He did not do so, and he cannot now be allowed to open up the case upon it.

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LORD PRESIDENT.—Wallace is not now properly maintaining an "action or suit" for these expences. He has already been allowed by Ewing to do this, and to recover a decree for their full amount. After that, it is merely legal diligence which is done to enforce the decree of a supreme court recovered in foro contentioso. I think any plea which was open to Ewing to state against Wallace's obtaining decree falls under the rule of competent and omitted, and he is barred from pleading it against the enforcing of that decree.

LORDS CRAIGIE and BALGRAY assented.

Feb. 3, 1831: The Court therefore altered the interlocutor, found the letters and charge orderly proceeded, and expences due to the charger, &c.*

Ewing appealed. No appearance was made for Wallace.

* 9 Shaw and Dun. 385.

Appellant. — The charger had not taken out his attorney's certificate in terms of the acts, 25 Geo. 3, c. 80, s. 1, and 37 Geo. 3, c. 90, s. 7, and was therefore disqualified from following out any diligence for payment of process expences. The latter act revives the former, except as far as expressly altered; and the two must be considered together. The charger is not protected by the 7 Geo. 4, c. 44, s. 3. But even if he had possessed his attorney's certificate the charge would be illegal, as the certificate was not recorded or entered in the court where the expences were incurred. The objection, "competent and omitted," does not apply. Although, no doubt, it is the privilege of the agent to take out a decree in his own name for the expences, most usually decree proceeding in name of the party to the suit. But if the party had taken decree, the want of certificate in the agent would have been of no consequence.—M'Gowan, Jan. 24, 1828, (6 Shaw & Dun. p. 420). If, therefore, before the charger took the decree, the appellant had raised this objection, it would have been thrown away, because the party would have taken the decree. Indeed, until the decree was actually taken by the agent, the objection of "no certificate" did not exist. It therefore could not be "competent and omitted." It is equally plain, that the appellant could not be expected to be prepared with it. He had no opportunity, as he did not know that the agent was to ask the decree, of ascertaining the fact of want of certificate, or of, on that ground, opposing the order. The objection arose with the very motion on which, as a matter of course, decree was given.*

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* The charger made no appearance by counsel at the bar of the House of Lords, but his statement in the Court below was, that he took
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LORD CHANCELLOR:—My Lords, This case has been heard before your Lordships *ex parte*,—the respondent, from the extremely small value of the matter in contest, not having thought fit, naturally enough, to attend here. But though the matter itself, as far as the question of fact and the amount are concerned, ceases to be of importance, yet the considerations in point of law connected with the question deserve attention; and I have been induced to pay the more attention to it, as it was perfectly evident that the decision in this case in the Court below could not stand, if the case of *Strachan v. Robertson* is held to be well decided. I take it to be perfectly clear, if this case is well decided, that that case is ill decided; and, vice versa, if that case is well decided, then this case is ill decided. Now, with respect to the first point relating to the certificate, how far a practising attorney comes within the provisions of the 25th and 37th Geo. 3, which two acts, it has been held, are to be construed together, and that the former of those two acts is entirely revived by the latter, except in so far as it is expressly altered, the question is, Whether Wallace was, within the provisions of those two

out two certificates, one in November 1827, and the other in June 1828. There was then no officer appointed by the Jury Court for recording licences. He took out a third certificate in December 1828, recorded by the proper officer of the Court of Session, and got his two other certificates also there recorded in 1829, before the charge was given; and long before 1826 he had passed writer to the signet. Besides, the charger was protected by the statute 7 Geo. 4, c. 44, s. 3. But even if any irregularity had existed, the suspender (appellant) is not in a situation to complain. In the Jury Court he stated many objections to the account of expences, but was silent as to this one, which he had ample opportunity to bring forward if he thought proper. He is therefore barred by the exception of "competent and omitted."—*Robertson*, June 29, 1826, 4 Shaw & Dun. 772; *Napier*, Feb. 7, 1828, 6 Shaw & Dun. 500.

acts, disqualified from prosecuting any suit in that Court? I cannot take the distinction hinted at by some of the judges in the Court below, of the decree being already obtained; that distinction I take to be untenable on many grounds, and it is against what the Court held in *Napier v. Carson*, where the question was in reference to the objection of competent and omitted, which forms so large a proportion of the discussion in this case. It is equally clear to me, that the Act of Indemnity, the 7th Geo. 4, does not cover this case. The objection, therefore, was open to the party, and must prevail, of the want of a certificate; Wallace was within the act disqualified, and came not within the Act of Indemnity; and, consequently, if the objection were open, and be now open, it must prevail; but the question is, Was that objection open? In the same case of *Strachan v. Robertson*, which I have adverted to, and which is so strong in the appellant's favour, that it appears to me the two decisions cannot well stand together, this view appears to have been taken by Lord Gillies, and fairly admitted, on the ground I put it upon. The question then is, Whether *Strachan v. Robertson* was a sound decision? The opinion I have formed, after much consideration, is in favour of the present judgment, and against the decision in that case. It is plain that the ground taken by the appellant, to get rid of the otherwise fatal objection of competent and omitted, fails. He says he had not an opportunity of stating the objection in limine. But he had that opportunity. I have taken great pains to inform myself as to the practice upon the subject, and I find, that after the account is taxed, the cause must be enrolled, to get a decree for the amount so allowed by the auditor; the appellant must

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No. 16. have had notice of that enrolment; he must have
 13th August known that the most ordinary course was to ask for
 1832. the decree in the name of the agent, and he might
 EWING have interposed his objection; and if he had, the Jury
 v. Court had jurisdiction to deal with it. Wallace taking
 WALLACE. the decree in his own name was a competent mode of
 constituting a debt due to him. It was tantamount to
 a suit at his instance, and made him quoad hoc pursuer,
 and he could have had the judgment without any objec-
 tion. There is no doubt that the Jury Court had
 power to deal with this objection, and therefore it was
 pending the proceeding in that Court that this objection
 should have been made. However, he got his decree;
 and the suspension of the charge goes on the ground
 that the objection could not have been made available
 in that process, or taken advantage of. The case of
 Napier v. Carson, to which I have already referred,
 with another view as to the first branch of the case
 relating to the certificate, bears with still greater force
 upon this branch of the case, and, in point of principle,
 in favour of this decision, and against the decision in
 the former case. I therefore humbly move your Lord-
 ships, that the interlocutor now complained of be
 affirmed, but, under the circumstances, without costs.

The House of Lords ordered and adjudged, " That the
 " said petition and appeal be, and the same are hereby
 " dismissed; and that the said interlocutors therein com-
 " plained of, be, and the same are hereby affirmed."

BUTT,—Solicitor.

[13th August 1832.]

ANTHONY DIXON and JOSEPH DIXON, Appellants. — No. 17.
Lushington — H. Robertson.

WILLIAM DIXON and others, Respondents. — *Lord*
Advocate (Jeffrey) — Knight.

Sequestration — Factor — Society. — The partners of a company having died, one intestate, and the last survivor having left a settlement, appointing trustees and executors, and the trustees and executors having accepted: Held (affirming the judgment of the Court of Session), that the representatives of the intestate partner were entitled to have the property sequestrated, and a judicial factor appointed.

THE Dumbarton Glasswork Company was carried on, during many years, by a succession of partners. After various changes, the partners remained three in number, holding equal shares, viz. John Dixon, his brother Jacob Dixon, and Alexander Houston. In 1821, Houston retired from the concern, leaving the two brothers sole partners. By the contract of partnership, in case of the death or of the bankruptcy of a partner, his interest in the company ceased, and the creditors of the bankrupt partner, or the representatives of the deceasing partner, were to receive their shares as stated in the balance immediately preceding the death or insolvency. Another regulation in the contract was, that the business should be carried on under the contract, although the stipulated duration should have expired, unless the contrary should be fixed by entries in the company's sederunt-book.

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When Houston retired, the contract had not expired, and it was alleged that he was paid out according to the balance-sheet immediately preceding, after certain allowances were made to keep up the value of the company's property. No new written contract was executed by the brothers, but they proceeded on the footing of the old contract. Before the next period for balancing arrived, John Dixon died, and Jacob Dixon, as surviving partner, became sole proprietor of the business.

Jacob Dixon assumed his own son, Jacob Dixon junior, and John, son of John Dixon deceased, as partners. The concern consisted of forty-one shares. Jacob Dixon senior kept twenty-one. He allotted to John Dixon ten shares, and to Jacob Dixon junior ten shares; stating the latter as debtor for the amount, 24,000*l.*, in an account current. John Dixon junior was stated as having paid up his ten shares of 24,000*l.*, and as creditor in an account current for a balance amounting together to 38,188*l.* The whole of this last sum remained under the command of Jacob Dixon senior.

It was alleged that a contract, to endure for seven years from the 30th June 1821, the date of the balance preceding John Dixon senior's death, to be held in force after that time, unless expressly altered, and providing that the representatives of a deceased partner should be paid out according to the balance-sheet preceding the death, was shortly afterwards entered into, and engrossed in the sederunt-book of the company. John Dixon junior died in October 1828, and William Dixon and others were decerned and confirmed his executors. By the balance-sheet of June 1828, the company were due to him nearly 36,000*l.*

For this sum the executors raised an action in the

Court of Session against Jacob Dixon senior and junior, the surviving partners, and who continued to carry on the business under the same firm. In a few months afterwards, Jacob Dixon junior died, survived by four children, Jane, Elizabeth, Joseph, and Anthony, all of them either minors or pupils. Having executed no deed of settlement and possessing no heritage, these four succeeded to him equally. The day after Jacob Dixon junior's death Jacob Dixon senior died, leaving two sons and three daughters, namely, Anthony, Joseph, Elizabeth, Louisa, and Catharine, all of age. Jacob Dixon senior had executed settlements, by which and a subsequent codicil he conveyed his whole property, heritable and moveable, to trustees, for payment of his debts and certain provisions to his sons and daughters. In regard to the residue, the deed bears: "Lastly, I appoint my
 " said trustees to convey, deliver, and make over to
 " Jacob Dixon, my eldest lawful son, the residue of my
 " said means and estate, after satisfying the provisions
 " and others above mentioned, and that so soon after
 " my death as my said trustees may have recovered and
 " laid aside sums sufficient for satisfying the provisions,
 " annuities, and others provided by this deed, and the
 " relative or supplementary deed before mentioned,
 " care being always taken that my said eldest lawful
 " son shall not receive less, out of my means and estate,
 " than the sum of 6,000*l.* sterling, or the value
 " thereof."

Anthony and Joseph Dixon accepted of the trust, and entered on the management. They commenced carrying on the works, and, as executors, they gave up an inventory of the personal means and estate of their father; but the inventory was defective.

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No. 17. It was alleged, that, on William Dixon and the other executors of John Dixon junior requesting information as to the state of the funds, the trustees gave no satisfactory account or explanation. The executors therefore, used inhibition and arrestment. Thereafter the trustees stopped the works, and the crown issued a writ of extent for duties. In this situation of affairs the executors became apprehensive for their interests. They found themselves liable for the debts remaining due by the old company of John and Jacob Dixon senior, to the amount of 31,000*l.*, John Dixon junior being the heir-at-law and general disponent of his father; and although they had, by their depending action in Court, claimed payment from Jacob Dixon senior and junior of nearly 36,000*l.*, and the assets of the company were said to amount to 126,000*l.*, there was reason to believe that to be a great over-valuation; in fact the estate seemed placed in much jeopardy, and no effectual and safe administration existed.

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Jacob Dixon senior and junior had in their defences alleged that the executors of John Dixon junior were merely representatives of a deceased partner of a dissolved company, entitled to a share of the funds at a final settlement, after payment of all debts. If this view were to be held correct, the executors maintained that it was clear that they had a formal title to call for the appointment of a manager to wind up the concern. But besides, and independent of the daily practice of the Court to take under its protection the affairs of minors, the executors held that it had never been doubted that where from circumstances an estate, by the death, absence, or incapacity of the owner, had fallen into

hazard of confusion or dilapidation, the Court never hesitated to appoint a manager, factor, or curator bonis; and the case which here occurred was one which required and called for an interposition of the power of the Court to prevent loss and ruin. The executors therefore prayed the Court to appoint a manager, with power to wind up the affairs of the Dumbarton Glass-work Company, and other companies composing the same partnership; or a curator bonis, or judicial factor, to protect the funds and estate of these companies for behoof of the minors and the petitioners, and all others having interest.

Anthony and Joseph Dixon, the trustees of the deceased Jacob Dixon senior, answered, that although it had been originally a provision in the contract of copartnership, that surviving partners should settle with the heirs of deceasing partners, according to the balance preceding the death, yet long prior to 1821, when the company consisted of three partners, Houston, John Dixon, and Jacob Dixon, it had been fixed, that, in case of the death of any of the partners, the concern should be wound up. The company continued for many years on this new footing, and the stipulation was frequently renewed. In 1821 Houston retired from the concern, and his interest was ascertained, by the special agreement of parties, and not on the principle in the original contract of paying out by the preceding balance.

When John Dixon died, the time had arrived when, according to the existing agreement, the concern was to be wound up. John Dixon junior represented his father universally in his heritable and movable estates. To him, therefore, belonged the free proceeds of his

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father's one half of the company estate; but he had no right to be paid out what was described as his father's interest in the concern, but merely to have the concern wound up, and then to take his share of the free proceeds, according as the affairs of the company turned out.

The alleged new contract of copartnery, said to have been entered in the company's books, never had been agreed on or executed; but even by that contract an allowance for bad and doubtful debts and other burdens is to be made, in ascertaining the value of each partner's share. But instead of the true value of his share in the concern, John Dixon junior's executors demanded the precise sum at his credit in the books, without reference to what division the assets of the company could bear. This attempt was of course resisted, when suddenly Jacob Dixon senior and junior died. Anthony and Joseph Dixon, the sons of Jacob Dixon senior, and his accepting trustees, found themselves placed in a situation of great difficulty, and they felt it their imperative duty, as representing the most deeply interested party, the principal and last surviving partner, to enter into possession of the company property, for the purpose of protecting it from loss, or rather destruction. This was a step, not of choice, but of necessity.

They proceeded with the utmost activity in the management, and by the interposition of their own individual responsibility paid part of the obligations of the company. But being harassed by the petitioners, impeded by diligence, by inhibition and arrestment, followed by a writ of extent on the part of the Crown, they were incapacitated from winding up the concern, as they otherwise could, without delay or loss. The

proposal for the appointment of a manager would have still more disastrous results. Besides the expence of management by a factor, the valuable trade of the company would be lost, and the works either abandoned or sold for a trifle. But, independent of the inexpediency of the measure proposed, the Court, in a just exercise of its authority, had no right or power to interfere.

In these circumstances they opposed the application, first, because the executors, being by their own showing merely creditors of the company, have no title to apply for the appointment of a judicial factor or manager. The whole estate and rights of Jacob Dixon senior are now vested, by his trust deed, in Anthony and Joseph Dixon, who are entitled to administer his personal estate. Such being the situation of matters, the executors have no title to subvert the administration fixed by law, and by the will of the defunct, and place the administration in the hands of a factor or manager. The creditors may take such steps as the law allows for recovering payment of their debts, but they can do nothing more.

But, 2dly, There is no legal ground for their demand. The whole estate was vested in the person of Jacob Dixon senior at the time of his death, and the whole has been carried by his deed of settlement to his trustees, liable of course to Jacob Dixon's debts and liabilities; and these, when ascertained, the trustees are desirous and willing to pay and satisfy. Holding, therefore, the executors to be creditors, that character merely gives them a right to call the trustees to account. It gives none to insist that they shall be deprived of the office. No doubt, when an estate is in danger of destruction or dilapidation, from the death, absence, or incapacity

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No. 17. of the owner, without any person legally entitled to take
 13th August charge of it, the Court have power to protect it by
 1892. appointing a manager or factor. But the Court never
 DIXON takes the management from those to whom the law has
 and another entrusted it, and commit it to a factor or curator of their
 v. own appointment. An opposite course would lead to
 DIXON endless confusion and expence.
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The Court sequestrated the funds and estate of the
 Dumbarton Glasswork Company, and the other com-
 panies composing the same partnership, as specified in
 the petition, and nominated and appointed a judicial
 factor on the sequestrated funds and estate, with power
 to take the same under his charge, and to manage and
 wind up the whole affairs of the said companies, and
 22d Dec. 1831. with the other usual power; the said judicial factor,
 20th Jan. 1832. before extract, finding sufficient caution in terms of the
 acts of sederunt.*

Anthony and Joseph Dixon appealed.

Appellants.—(1.) The whole stock and estate of the
 company became the absolute and entire property of the
 surviving partner, subject to a claim, at the instance of
 the representatives of deceased partners, for the value
 of such partner's share, and for relief of the obligations
 contracted by the company. Therefore, on the death
 of Jacob Dixon junior, Jacob Dixon senior became
 proprietor of the trade, stock, and estate of the com-
 pany, and the respondents became creditors of Jacob
 Dixon senior and junior. On the death of Jacob Dixon
 senior, the appellants, as his trustees and executors, as-
 sumed, as they were entitled to do, possession of the

* 10 Shaw and Dun., 178 and 209.

whole estate, with power to sell and dispose of the estate uplift, rents and debts, as the deceased, if alive, could himself have done, subject no doubt to the claims of creditors, whether the representatives of deceased partners or third parties. Who else was entitled by law to take and hold possession of and administer the estate of Jacob Dixon senior? Is it not clear that executors nominated by the defunct himself are preferable over all others to the possession and administration of the defunct's estate? — Ersk. Inst. 3, tit. 9, sect. 32.

(2.) The Court had no power to sequester or to appoint a judicial factor on the estate, for the purpose of managing and winding up the affairs of the company. Here there are parties legally in the management, and it is only where property is left unprotected, and without a legal custodier, that the Court interferes. The interposition of the Court depends on and can be justified only by the necessity of the case.—Bryce, 25th January 1828, (S. & D. p. 425); Buchanan, 3d August 1782, (Mor. 14,350).

(3.) Even if the Court were entitled to sequester in cases where there is not a necessity, but merely a supposed expediency, there is no expediency to call for their interposition in the present instance; but, on the contrary, sequestration will be detrimental, indeed ruinous, to the parties concerned. The appellants are peculiarly well qualified to wind up the affairs. The trade is very complicated, and requiring great local knowledge. The appellants have a deep interest to create the largest surplus. They have the best means of judging how the estate can be realized to the greatest advantage, both by disposing of the property at fitting times, and by adopting prudent means for recovering

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the debts due to the company; and all this they can do at the least possible expence. But the sequestration of an estate is never profitable; nay, a learned judge of the last century described it as a licence to mismanage. If a factor or receiver be appointed, he will deem it his duty to realize the estate by the most expeditious means. He must proceed against debtors of the company without delay or indulgence. The result will inevitably be, that this advantageous trade will be annihilated, and the assets of the company reduced by a half. The appellants have made every tender to settle by amicable arrangement; but nothing will satisfy the respondents but the confusion and loss the necessary consequence of a factory.

Respondents.—(1.) The Court is merely called upon to protect, in the meantime, by the appointment of a judicial manager, the interests of all parties. All the partners have died, and the company has thus become dissolved. Where there is an existing partnership there is confidence between the partners; if one survives, the confidence remains, and he is entitled to recover. But among representatives there is no confidence; and the Court will appoint a neutral person to wind up the concern, especially where interests of such magnitude, as in the present case, are involved and exposed to risk. It is not enough that the trustees hold the usual powers bestowed on trustees. There is no survivorship at law in personal property belonging to a partnership. Jacob Dixon senior did not and could not delegate to the trustees powers to wind up the partnership, or to carry on the trade, in which the representatives of other partners were interested; nor are the appellants quali-

fied for such an undertaking. It makes no difference that the respondents should claim in the character of creditors the protection which they now seek. It cannot injure their title that, besides being the representatives of one of three deceased partners, they are also large creditors of the two other deceased partners. (2.) The power of the Court to appoint a manager never has been doubted. (3.) The present is a case in which the Court ought to exert that power.—2 Bell, 643; 1 Montagu, 165; Philips, 2 Bro. 272; Godfrey, cited in *Pearce v. Chamberlain*, 2 Vesey, 33.

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LORD CHANCELLOR:—My Lords, before deciding this case, I should wish to have time to consider some of the matters of law and fact which have been argued, and more particularly with a view to the power of the Court in appointments of this kind, and the way in which the factor or receiver can be dealt with; for there seems to be a difficulty in obtaining any very precise light on the subject of the power of the Court, either in appointing a judicial factor, or in calling upon that judicial factor to account after he is appointed. I shall not give any opinion one way or the other; but I should wish to have an opportunity of considering the practice, and the authorities on the point, before I state to your Lordships how the case strikes me.

Consideration postponed.

LORD CHANCELLOR:—In this case I stated to your Lordships, that I required some little time to look into the practice as well as the facts of the case, because the question did not appear to me to be very

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satisfactorily settled by the decisions, with respect to the power of the Court of Session to appoint a judicial factor, which is in the nature of a receiver, and as to the mode in which these powers were exercised; I have now satisfied myself that their Lordships have come, upon the whole, to a right decision in this case. And in advising your Lordships to affirm the interlocutor, I should wish it to be understood that it is with reference to the particular circumstances of this case, and without laying down any general rule as to the power of making this appointment, or the mode in which it is to be executed. In the circumstances of this case, I hold their Lordships were well advised in exercising that power, of appointing a judicial factor; but I do not advise your Lordships to give any costs upon the appeal.

The House of Lords ordered and adjudged, “ That the “ interlocutors complained of be, and the same are hereby “ affirmed.”

MONCRIEFF and WEBSTER — SPOTTISWOODE and
ROBERTSON, — Solicitors.

[15th August 1832.]

ADAM LUKE and others, Appellants.—*Dr. Lushington*
—*Wright.*

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THE MAGISTRATES OF EDINBURGH and Rev. JOHN
HUNTER, Respondents.—*Lord Advocate (Jeffrey)*—
Simpson.

Church.—Held (affirming the decree of the Court of Session) that the town council of Edinburgh, as patrons, were entitled to appoint an assistant and a successor to a minister who was disabled by age from performing the duties of the office, the minister giving his consent to the appointment.

Process.—Although a party found on a fact in his summons, yet if he do not do so in his condescendence he cannot afterwards avail himself of it.

Appeal.—Opinion intimated, that, where the pleadings in the Court below entitle a party to insist on an objection, the House of Lords are not barred from deciding the appeal upon that objection, though it may not have been pressed in the Court below, and though it form no part of the consideration of that Court in pronouncing the interlocutor appealed from.

THE Rev. Dr. Simpson and Dr. Brunton were incumbents of the church and parish of Tron, in Edinburgh, which is a collegiate charge, but of which the Town Council are the patrons. In April 1829 Dr. Simpson, who was at this time eighty-five years of age, owing to decline of health, wrote, with the concurrence of Dr. Brunton, to the Lord Provost, requesting to have a minister associated with him as assistant and suc-

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cessor; and the Town Council, by a majority of nineteen to twelve, resolved to appoint Mr. Hunter assistant and successor, against which determination a protest was entered.

Mr. Hunter was presented, and his presentation was sustained by the presbytery and affirmed by the synod, and afterwards by the general assembly, to which it had been appealed.

In the meanwhile the appellants, as dissenting members of the town council and elders of the kirk session, raised an action of reduction of the acts of the council, and presentation against the other members of the town council, Dr. Simpson and Mr. Hunter.

During the discussion of the reduction Dr. Simpson died, and thereupon a separate action was raised of reduction of the presentation, and a declarator of the right to present to the incumbency, as having become vacant by Dr. Simpson's death. This action was conjoined with the first, and when the conjoined actions came before the Lord Ordinary, his Lordship sustained the defences, and assoilzied, with expenses, and issued the following note, in which the facts are fully detailed:—

“ The Lord Ordinary has considered this case
 “ with care, because it has been treated as a case of
 “ importance. It is undoubtedly a case of great im-
 “ portance in some views of it; but he should not do
 “ justice if he did not state that it is a case in which
 “ he has never entertained the slightest doubt.

“ The material facts are simple: Dr. Simpson, at the
 “ age of eighty-five, intimated to the town council
 “ that he had no hope of being able to continue to

“ discharge the duties as minister of the Tron Church
 “ of Edinburgh, and that he was desirous, if the town
 “ council approved of it, of having an ordained
 “ minister of experience appointed assistant and suc-
 “ cessor to him. The proposal lay a week on the table
 “ of the council, and was then approved of. Dr. Brun-
 “ ton, the collegiate minister of the same church, ex-
 “ pressly consented. On the 13th May 1829 the
 “ council resolved to present Mr. John Hunter, a
 “ person in all points qualified; and no step having
 “ been taken to prevent this, a presentation was given
 “ to him on the 10th June 1829. That presentation
 “ was regularly sustained by the presbytery, without
 “ any objection having been stated by any private
 “ party. Then a question on the ecclesiastical merits
 “ of the case arose among the members of the court
 “ themselves, and was terminated by a final judgment
 “ of the general assembly 1830, holding the pre-
 “ sentation to be good, but, as an action of reduction
 “ had been raised on the eve of the sitting of the as-
 “ sembly, superseding the induction till the issue of
 “ that process, according to the uniform practice since
 “ the case of Lanark.

“ Mr. Hunter’s induction was prevented solely by
 “ the proceedings in the church courts, to which the
 “ pursuers were no parties; and if he had been in-
 “ ducted there must have been an end of the matter.

“ The first reduction was not brought till after the
 “ presentation had been sustained by the presbytery,
 “ and their sentence had been affirmed by the synod.
 “ There seems, therefore, to be much ground for the
 “ plea, that the pursuers had no right afterwards to
 “ insist in any reduction, the act 1567, c. 7. being

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- No. 18. “ explicit as to the effect of the judgment of the
 15th August “ church courts, and no civil impediment having been
 1832. “ previously attempted. But the Lord Ordinary does
 LUKE “ not rest his opinion on this, though he has yet heard
 v. “ no good answer to it.
 MAGISTRATES “ The main question is, had the town council, the
 OF “ undoubted patrons, power, on the application of
 EDINBURGH. “ Dr. Simpson, to grant the presentation to Mr. Hun-
 “ ter? There is no difficulty in form. The particular
 “ objections stated appear to be groundless, and were
 “ scarcely insisted on at the bar; and the presentation
 “ is in the usual form in such cases. The question is,
 “ have the patrons power to make the presentation to
 “ the effect of warranting the presbytery to ordain or
 “ admit Mr. Hunter as minister, assistant, and succes-
 “ sor in the parish.
 “ The case has been argued to the Lord Ordinary
 “ on a denial of the legality of this in any parish. He
 “ is humbly of opinion that the plea is untenable as
 “ matter of law, and irrelevant and groundless in any
 “ other view.
 “ In order to take a right view of this question it is
 “ necessary to attend to the genius and constitution of
 “ the church of Scotland. It cannot justly be tried by
 “ any reference to the rules or the proprieties appli-
 “ cable to establishments of a different nature, or by
 “ analogies drawn from offices of a different character.
 “ The fundamental principle of the Scottish church is
 “ that every man admitted into ecclesiastical orders,
 “ every man ordained as a minister, must be ordained
 “ as actually the minister of some parish or of a
 “ chapel district precisely fixed. There is no such
 “ thing in the church of Scotland as ministerium

“vagam, either practically or theoretically; no such thing as plurality of benefices; no such thing as a minister ordained without a cura animarum, to which he is appointed for his life.

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“From this principle, fixed at the reformation, difficulties have naturally arisen when ministers fall into great age or infirmity. These difficulties are lessened by the practice of allowing candidates for the ministry to preach after being licensed by the presbytery. But these are not and cannot be ordained ministers, enabled to administer the sacraments, and to discharge other duties dependent on ordination; and still, therefore, in many special cases a different remedy was required. That remedy was found, at an early period, in the plain, simple, and very sensible expedient of the presentation and induction of a fit person into the condition of a minister of the parish for his life as assistant and successor to the existing incumbent. The person so appointed becomes immediately an ordained minister of the church, subject to all the obligations implied in the character. He is received as a member of the presbytery and synod, entitled to vote whenever the principal is absent, and eligible as a member of the general assembly. These things are beyond all doubt, and are sanctioned by at least a century of undisputed practice.

“It is manifest, therefore, that the institution of assistants and successors in the church of Scotland, introduced from a necessity inherent in the very constitution of the church, and for the advantage of the people, has no resemblance or affinity to grants of offices in reversion, and is essentially different even

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“ from the appointment of assistants and successors in
 “ any other case. And it must be kept firmly in re-
 “ membrance, that it is attended with the most im-
 “ portant securities against abuse. The consent of
 “ the existing minister, at least if he is capable of
 “ consent, is indispensable. The patron of course
 “ must consent; but when these two are agreed, the
 “ consent of the presbytery, and, if called for, of the
 “ synod and general assembly, must be obtained.
 “ The whole question of reasonable necessity, expe-
 “ dience, and propriety undoubtedly belongs to these
 “ courts; and if they think the measure improper,
 “ or an abuse of the patron’s right, they certainly
 “ have power to put a negative on the proposal.
 “ And practically the statement of the pursuers, as
 “ to the small number of such appointments, compared
 “ with the number of livings and vacancies, while
 “ the legality of them has been recognized for a
 “ century, demonstrates that these checks have been
 “ effectual, that the practice has been kept under due
 “ control, and that there is no evil or abuse involved
 “ in it.

“ It is admitted on the record that there is a series
 “ of examples to the number of forty-three, well
 “ authenticated, of assistants and successors so ap-
 “ pointed, from 1742 to the present time. There
 “ is reason to think that the practice was introduced
 “ much earlier. See note in Connell on Parishes,
 “ p. 515. These examples run over the whole church
 “ and country. They comprehend royal boroughs as
 “ well as country parishes:—Glasgow, Dumfries, Mont-
 “ rose, Cupar, Ayr; and one of the last instances,
 “ though in a country parish, was by the presentation

“ of the town council of Edinburgh. In not one of No.18.
 “ all the cases was the legality of the appointment, as 15th August
 “ matter of civil right, disputed. The Lord Ordinary 1832.
 “ holds this alone to be decisive of the general question LUKE
 “ —an admitted and unchallenged practice over the MAGISTRATES
 “ whole church during ninety years. It might have OF
 “ been more extensive if any serious abuse had been EDINBURGH.
 “ practicable; but if the control is efficient, the
 “ extent of the practice is of course limited by the
 “ necessity.

“ But there is much more in the case. In the first
 “ place, the legality of such appointment has been
 “ recognised by the church courts. The assistants and
 “ successors have not only been duly ordained and
 “ inducted, but they have been recognised as members
 “ of all the church courts, exercising the most impor-
 “ tant rights, both ecclesiastical and civil. They have
 “ been incorporated in the constitution of the church,
 “ and public acts to which they are parties have been
 “ recognised in all the civil courts. In the next place,
 “ they have been expressly acknowledged as holding a
 “ legal status, both by the Court of Session and by the
 “ Court of Teinds. See Connell on Parishes, pp.517-18.
 “ Case of Cadder; Muir v. Dunlop, 9th December
 “ 1791; and Campbell v. Stirling, 4th March 1813.
 “ And see the case of Melrose, Connell on Tithes,
 “ vol. i. p. 455, where a process of augmentation having
 “ been brought by the principal minister, and the
 “ augmentation having been refused to him, the Court,
 “ on a petition by the assistant and successor, and with
 “ the consent of the heritors, awarded an augmentation
 “ to him out of the teinds. He could not indeed have
 “ raised the process, because he is only conditionally

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“ vested in the benefice, as decided in *Shaw v. Heritors*
 “ of Robertson, 29th January 1806. But his cha-
 “ racter was clearly recognised as a lawful status,
 “ otherwise no consent of the heritors would have war-
 “ ranted the proceeding.

“ In the third place, these assistants and successors
 “ have been recognised in various British statutes.
 “ They are so in the acts establishing the Widows Fund,
 “ 17th Geo. II. (1744) cap. 11. sec. 11., 22d Geo. II.
 “ cap. 21., and 19th Geo. 3. cap. 2. sec. 9. Their
 “ status as churchmen is, therefore, sanctioned by sta-
 “ tutes in full force ever since 1744. They are to be
 “ deemed and taken to be ministers to all the purposes
 “ of the acts. But the later statute of 48th Geo. III.
 “ cap. 50., relative to grants of offices in reversion, is
 “ still more important, as containing an express excep-
 “ tion from its provisions, which it is assumed might
 “ otherwise have been taken to apply to the case, ‘ that
 “ ‘ nothing in this act shall extend, or be construed to
 “ ‘ extend, &c., to prohibit the appointment of assis-
 “ ‘ tants and successors to the parochial clergy of
 “ ‘ Scotland.’

“ It seems to the Lord Ordinary to be quite impos-
 “ sible, in the face of these facts, and without a single
 “ authority or decision on the point, to maintain
 “ that such appointments, when duly proceeded in, are
 “ illegal. The passages in Erskine and other authors
 “ which are quoted, only announce the undoubted
 “ general truth, that no patron can present to the
 “ expectancy of a benefice. This plainly does not
 “ contemplate the special case of the immediate induc-
 “ tion of an assistant and successor into the whole
 “ duties of the parish on a declared necessity by the

“ proper authority. That is not a presentation to an
 “ expectancy, but to an immediate cure, and at any
 “ rate it is a special case fully established by a long
 “ usage.

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“ Neither do the cases referred to by the pursuers
 “ appear to have any material application to the ques-
 “ tion. The only one to which it seems necessary to
 “ advert is that of *Arnott, &c. v. Flints, &c.*, as de-
 “ cided by the House of Lords 26th May 1809.
 “ Though that case was much relied on by the pur-
 “ suers it humbly appears to the Lord Ordinary that
 “ it can afford them no aid; for, 1st, it was the case
 “ of a professor in a university. That is altogether
 “ different from the case of a minister of the church;
 “ it has not in it the important quality, that without
 “ ordination the full duties of the place cannot be
 “ performed. Neither has it the same sanctions; and
 “ each university, being independent of all the rest,
 “ may be only affected by practice within itself. 2d,
 “ the very case of assistants and successors in the
 “ ministry is expressly acknowledged as beyond dis-
 “ pute lawful by both the parties in that cause. 3d,
 “ it was the case of a professorship, where the other
 “ professors were the patrons, and where consequently
 “ there could be no jurisdiction to control an abuse.
 “ 4th, the King being the visitor of all colleges, it
 “ might be competent to the King’s Courts to control
 “ the exercise of the right of patronage in such a case,
 “ and more especially to determine whether it was
 “ warranted by the terms of the endowment, which
 “ was one of the points put in issue. 5th, it was
 “ plainly a case of the grant of an expectancy; for the
 “ very terms of the appointment showed that it was

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“ not intended or expected that Dr. Flint, junior, should
“ immediately, or at any given time while his father
“ lived, enter on the duties of the office. And 6th, it
“ was, in its circumstances, liable to other very serious
“ objections. But while these considerations plainly
“ place the decision, the particular grounds of which
“ are nowhere reported, on a footing which entirely
“ removes it from the principles of this case, it is to be
“ remembered that it was only in the previous session
“ of parliament (1808) that the statute 48th Geo. III.
“ was passed, in which all grants of offices in reversion
“ were prohibited, with the express exception of the
“ appointments of assistants and successors to the pa-
“ rochial clergy of Scotland, while no such exception
“ was made of similar appointments to professorships.

“ If the general plea of the pursuers against the
“ legality of such presentations cannot be sustained, it
“ seems to be clear that there is no specialty which can
“ avail them. The town council of Edinburgh have
“ the same powers as other patrons; and, the question
“ being one which relates to the church at large, it
“ can be of no consequence whether the practice has
“ been followed or has been frequent in Edinburgh or
“ not. What has been law for Glasgow, Ayr, &c., and
“ generally over Scotland, must be law also with regard
“ to the powers of the patrons of Edinburgh in this
“ matter. They have power to present upon actual
“ vacancies by death, &c., and they have power to
“ present assistants and successors, when the cases
“ which render this necessary or expedient arise. And
“ the Lord Ordinary can see no evil or danger in this.
“ For, the question of expediency being subject to
“ the control of the presbytery, when the case does

“ occur, the council for the time is just as competent
 “ to present a fit person for the benefit of the public
 “ as any council which succeeds them can be presumed
 “ to be. If they do not take due pains, that is their
 “ fault, and in a question of law is not to be presumed.
 “ They are to exercise the power (as Dr. Simpson
 “ expressly asked them to do) precisely as they would
 “ if there was a vacancy by death.

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“ As to the statement of this being a collegiate
 “ church, Dr. Brunton being fully competent to the
 “ whole duties, &c., the Lord Ordinary thinks them
 “ altogether irrelevant in this Court. They were very
 “ fit to be stated to the presbytery, if the pursuers
 “ thought them of importance; and, though the pur-
 “ suers did not state them, it has been stated by the
 “ defender that they were fully canvassed in all the
 “ church courts. As the church or parish has two
 “ ministers by law, it must be presumed that two in
 “ full orders are necessary, and this may very well be,
 “ from the nature of the population, though the parish
 “ be not large. Dr. Brunton is also a professor in the
 “ University; but though he had not been so, he had
 “ a right to an efficient colleague, and Dr. Simpson
 “ was eighty-five years of age.

“ The church courts, therefore, having confirmed
 “ the appointment, and ordered the induction, the
 “ Lord Ordinary is of opinion that all questions of par-
 “ ticular expediency are excluded, and that the case
 “ must stand on the same footing as if it had arisen on
 “ the last presentation of an assistant and successor
 “ given by the town council of Edinburgh, or on
 “ such a presentation by any other patron, which had
 “ been sustained by the presbytery.”

No. 18. Luke and others reclaimed, but the Court unanimously adhered* ; and the present appeal was brought.
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Appellants.—1. The appointment was not validly made, because there was no legally constituted meeting of the council, the deacons not having been duly summoned to attend. 2. Supposing there was a legal meeting, still the town council, as patrons of the parishes of the city of Edinburgh, are only authorized to present upon an office or benefice becoming vacant, because until that event happens any step taken by an existing town council to appoint a successor becomes an assumption of power not vested in them, but remaining with the community to be brought into operation through the medium of the council existing when the vacancy arises ; besides, an appointment to a benefice by anticipation is illegal, inexpedient, and prejudicial to the interests of the church and of the community.†

Respondents.—1. There are no facts stated in the record relevant to raise the objection to the validity of the meeting of the council, and it was not pleaded in the Court below. It is therefore incompetent, and besides is not well founded. 2. By the law and practice of Scotland an assistant and successor may be named by the patron when the circumstances of the parish require it, although the benefice be not vacant ; and in this matter there is no distinction in principle, and none has

* 10 Sh. & D. 307.

† *Appellant's Authorities.*—Arnott, 26 May 1809 (Appeal Papers, Adv. Lib.) ; 1 Ersk. 5, 11 ; Stuart, 24 Jan. 1677 (9899) ; Connell (Parishes), 514 ; L. Garbet, 15th Dec. 1693 (13115).

ever been made in practice, between individuals and corporations who possess the right of patronage.*

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LORD CHANCELLOR.—My Lords, in this case of Luke and Hunter two questions were raised at your Lordships bar, one of which only appears to have undergone full discussion in the Court below. The first question, and that which was not discussed in the Court below, relates to the legality of the meeting of the town council of Edinburgh, at which the appointment in question took place. To the legality of that meeting objections have been taken at your Lordships bar upon two grounds; in the first place, that the proper members of the council were not present, namely, the deacons; but chiefly upon the ground that the proper summons was not given to all those deacons to the council; for it appears to me, if that summons had been regularly and legally given, which it is denied had been given, their absence would not have rendered the meeting illegal, and that consequently that objection would fail. But it was said, that inasmuch as there was a deficient summons of these deacons the meeting of the town council was not legally called and constituted. I was inclined to think there was a great deal which deserved consideration in this objection, which certainly had not been taken, or if taken, was almost immediately abandoned in the Court below. There appears upon the face of the Lord Ordinary's most elaborate and learned interlocutor enough to

* *Respondent's Authorities.* — 17 G. II. c. 11. § 11; 22 G. II. c. 21; 19 G. III. c. 2. § 9; 19 G. III. c. 20; 48 G. III. c. 50. Connell (*Parishes*), 514; Dunlop, 9 Dec. 1791 (7470); Campbell, 4th March 1813. (F. C.)

No.18. satisfy your Lordships that it had not been insisted upon; and it seems to be agreed upon all hands, that
15th August 1892. if it was not formally abandoned it was substantially abandoned in the course of the argument there. That
LUKE it formed no part of the consideration of their Lordships in pronouncing the interlocutor appealed from, is clear. No trace is to be found of it in the reported case, or in the interlocutor itself, nor in the fuller note with which I have been furnished. Nevertheless, if I had been satisfied that the pleadings in the Court below entitled the party to insist upon that objection, and that the objection, if competent to be insisted upon, was valid, I should not have considered myself precluded from advising your Lordships to decide, and I should not have considered that your Lordships were precluded from deciding the question upon that ground, and upon no other. Nothing can be more important in every thing relating to the proceedings of corporate bodies than those regulations which govern the constitution of their meetings. If there is any one part of their regulations which is more especially important than another it is that part which refers to the governing and the calling of those meetings; for if a certain part of the corporate body has a right to attend when any business is transacted, and if there is laid down by the rules of the corporation, either by the original charter or by the bye laws, a mode of summoning those who have such right to attend, and if that mode of summoning is not pursued, and strictly pursued, it is manifest that the right of those corporators to attend is of no avail; for behind their backs, and by surprise, a corporate act may be done which it was the intention of the provision in the charter or the bye laws to

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prevent being done without their being present. Consequently, in all cases of this kind, in all the statutory provisions made from time to time, whether in local or in general acts of Parliament, the greatest attention has been given that the corporators shall duly have their summons, as the means of effectually securing to them their rights; so that, if summoned, their absence is their own fault, and they have no right to complain of any thing being transacted behind their backs. I therefore looked very narrowly into this part of the case, to see if there was a defect in the summons of these people to attend at the meeting at which this appointment of an assistant and successor took place. The validity of the objection depends, as far as this record enables your Lordships to judge, upon the decret arbitral of James the Sixth, and still more on the decret arbitral of Lord Islay, many years afterwards, in the year 1730. There might be some question raised whether or not the first decret was to be taken into consideration, where any thing was left doubtful upon the face of the latter; but at any rate, and without raising that question, it is clear that if you take the decret arbitral of Lord Islay to be the governing charter, it is there laid down, "that the extraordinary deacons have a right and ought to be adjoined with the ordinary council, at least ought to be legally called for that end." By this I understand the mere right of being "adjoined with the ordinary council;" and that the words "for that end" refer to the preceding part and not to the succeeding part of the clause, "when they are to proceed to the election of provost, bailies, dean of guild, or treasurer, or give benefices or other offices within the borough," or

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do almost any other act. They are entitled to be present, or at least to be legally called in order to be present, and adjoin the ordinary council; and the question then is, what, under this decret arbitral, is to be held a legal call of the extraordinary deacons at the giving of benefices? Some light might have been thrown upon the case by the decret arbitral of James the Sixth, if we suppose that the decret of Lord Islay, and not that of the monarch, was the governing charter. But the best and steadiest light to be thrown upon this subject is to be found in the uniform usage of the corporation for a century, from the latter of these instruments. If usage was to be taken into consideration, and if the question was raised competently upon the pleadings, the point would be, whether or not what was done upon the present occasion amounted to a legal call of the deacons. But that usage is excluded from the consideration of your Lordships by issue having been taken upon it, and no admission upon the record that the usage is as pleaded by one of the parties, and the issue not having been tried. It is stated by the defenders (the respondents), "that the practice of the town of Edinburgh has been for the Lord Provost to appoint the council and extraordinary deacons to meet every Wednesday for the dispatch of business; and this is the only notice which is given for ordinary meetings, whatever may be the nature of the business: That the general summons issued at the beginning of the year is in the following terms:— 'The Lord Provost appoints the magistrates and council, and extraordinary deacons, to meet every Wednesday at twelve o'clock, without any warning, for the despatch of business, unless they get inti-

“ ‘ mation that there is to be no meeting in any par-
 “ ‘ ticular week or weeks ; ’ ” and then the respondents
 add, “ an intimation or warning to the above effect is
 “ always given after the election of magistrates, and is
 “ entered in the annual record, and no other warning
 “ is ever given to these parties to attend.” Here,
 therefore, is a distinct averment, in point of fact, on the
 part of the respondents, that the usage is perfectly
 conformable to what is admitted to be the fact in the
 present case ; and it is so distinctly averred, that if it
 had been admitted on the other side there would have
 been no mistake as to that important fact. But, un-
 fortunately, that is not admitted, but denied ; for the
 pursuers in their answer admit, “ that after the annual
 “ election the council and deacons are directed to meet
 “ every Wednesday, but it is denied that this is the
 “ only notice that is given, or that the practice is as
 “ here set forth ; ” and they say “ in whatever form it
 “ may be done, due intimation is always made when
 “ any extraordinary business is expected to be brought
 “ forward.” Therefore, in the first place, there is no
 admission of the usage, and in the next place, there is
 an issue taken upon the fact of the usage ; and there
 being no admission, and that issue not being tried, your
 Lordships are left in this case, as you are in too many
 of a similar kind that come from Scotland, extremely
 short of facts, where facts are necessary to dispose of
 the question. Now, my Lords, that being so, we are
 to exclude the usage from our consideration, as if it
 were not to be found within the four corners of this
 statement, and we are therefore to go upon the decret
 arbitral of King James, and the decret arbitral of Lord
 Islay, and upon those we are to satisfy ourselves in the

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best way we can as to the construction of the word "legally called," and as to what amounts to a legal call of the deacons. I do not think that the facts of this case are sufficient, and I do not think that the instruments themselves are sufficient, to enable me to see very clearly what is a legal calling within the meaning of these provisions. It is very possible, morally speaking, they might show that the general calling is sufficient; but if I come to that moral conviction, it is because I have a strong belief that they would have been able to prove what they aver if they had gone to an issue and had tried it. I feel no confidence sufficient in the construction to say whether the general calling was sufficient, or whether a special summons for the purpose of that specific election was not necessary to make it valid within the meaning and the language of the decret arbitral. It is exceedingly possible, if the question had been made to turn upon it in the Court below, and they had directed an issue, which they would have done, that the result of the inquiry into the fact would have been that the usage was such as to enable us to consider that a general summons was enough, and that a particular notice was not necessary. But now comes the question, and a material one it is, whether, admitting that the construction of these instruments, particularly the decret arbitral of Lord Islay, is that a special summons was necessary, and that the summons given was not sufficient, your Lordships have a right upon the pleadings to decide this case upon the ground? or in other words, are the pleadings in such a state as to give the parties a right here, or to have given them a right, if they had chosen to have availed themselves of it, in the Court below, to raise the objection? And

upon the best consideration I am clearly of opinion that the state of the pleadings does not give them that right,—that they have not raised the objection upon the pleadings in such a competent shape as to give them a right to insist upon it; for the reasons I shall presently state to your Lordships. This objection ought to have been taken by the pursuers in their condescendence; it is not sufficient that they raise the question in their summons. Where the parties do not agree to let the matter rest upon the summons and the defences, they are to let it rest upon the condescendence and the answers; and I take it, if a party insert in the summons a fact which he wholly drops in the condescendence, he must be taken, as the parties have not agreed to abide by the summons and the defences, to have abandoned or departed from that statement which he has dropped between the summons and the condescendence. Now, do your Lordships find that objection stated within the four corners of the condescendence? Clearly not. The sixth article is said to contain it under the words “inasmuch as the whole deacons of “crafts were not present, and the council was not full “at the meeting of the 13th of May,—Baillie Small “and Deacon Cleghorn not being present, and the “council not being made full by proxies.” That is not an objection upon the ground of an undue summons and defect of warning under Lord Islay’s decret arbitral, or a want of legal calling, but it is an objection framed upon the decret arbitral of James VI. If it had been pleaded that they were not only not present, the Council not being full, but they had not been duly warned, then there must have been an admission of this fact by the respondents, or there must have been a

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denial of it; and that would have raised the issue of fact. Then comes the respondents statement of facts, in which, in articles 9th and 10th, and in article 12th, they set forth the practice, and in which it is differently set forth from that stated by the pursuers. They admit part, and deny the rest; but the admission does not go to that part of the pursuers objection as to the want of summons; this part, therefore, does not cure the defect which belongs to the condescendence. But then, it is said, that defect is supplied by the pleas in law of the pursuers; and the 5th plea in law is, "the appointment of Mr. Hunter was not made at a meeting of council lawfully called and constituted." It is said that this is the averment which we were in quest of in the condescendence, and that this is the fact that the condescendence had omitted. My Lords, I take that not to be the office of a plea in law. I take the plea in law to be a note for the convenience of the Court, and, as it is stated distinctly in the 8th and 9th sections of the 6th of the late King, cap. 120, that the record may be adjusted with a due regard to matters in law; but it is manifest from the course of the proceedings, and the manner in which it is dealt with, that the plea in law is not intended to be a parcel of the condescendence. The office of a plea in law is this: the facts having been dealt with in the condescendence and answers to raise the argument of law, the one party may say, this conclusion of law in my favour arises from the facts I have stated, and the other party may deny that conclusion of law, or raise another in his own favour, either from any facts that his adversary has stated, or from the facts he himself has stated; but it is clear that the plea in law is confined to the con-

clusion of law from facts stated, and that it cannot be taken to supply what has been left out of the condescendence. Indeed, a conclusive reason why a plea in law cannot be held to supply a defect in the condescendence upon the state of facts is this, that it would then be too late for the other party to meet it, by denying it, or raising any other allegation of fact. It would amount to an exclusion of his negation of the fact. Now, this being the state of these pleadings, my opinion is, that this objection comes too late, and that it is unnecessary to decide whether, if the objection had been taken competently, it would have been available; and therefore, as far as regards the first branch of the case, the decision must be in favour of the respondents.

This brings me to the other branch of the case; and as I agree in the judgment to which the Court below came it will not be necessary for me to trouble your Lordships at any great length. The question is one of very great importance, but, as it appears to me, one of much less difficulty. That question is, can a patron validly appoint an assistant and successor to a clergyman whom he has already placed in the Scotch kirk while that clergyman continues in that church and has not rendered it vacant by his resignation? I regard with the greatest possible respect the authority of that most learned and excellent Judge from whose interlocutor in the Court below this appeal has been brought,—I mean Lord Moncreiff,—one of the most learned individuals who adorn that bench, or who ever adorned that bar, and peculiarly qualified to decide this question, from the whole habits of his life; and I entirely agree with the Learned Chief Judge of the Court

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No. 18. below, in all that he so feelingly and so eloquently and
15th August justly says of the hereditary claims to the respect of
1832. that Court possessed by the son of one of the most
LUKE learned and venerable fathers of the Scotch church.
v. Nevertheless, my Lords, with all the respect it is possible
MAGISTRATES to entertain for his authority, and though entirely
OF agreeing in his opinion upon the matter of law, with
EDINBURGH. perhaps a single point excepted, which I see one or
two of the Learned Judges have referred to as to a
point that does not affect the decision of this case, I
cannot take the same view that Lord Moncreiff appears
to have done as to the practice of appointing an assistant
and successor being wholly unattended with risk. He
says, "practically, this statement of the
" pursuers, as to the small number of such appointments,
" compared with the number of livings and
" vacancies, while the legality of them has been recognised
" for a century, demonstrates that these checks
" have been effectual, that the practice has been kept
" under due control, and that there is no evil or abuse
" involved in it." That, in point of fact, there may
have been no abuse, is very possible; but that there is
no evil involved in it, by which I understand no tendency
to abuse, as contradistinguished from any abuse, I am not
prepared to say; and Lord Moncreiff appears, by an oversight,
to have a little understated the amount to which it exists
in the Scotch church. He seems to consider that the number
of forty-three are all the instances of those appointments
that have existed during a long course of years, from 1742
to the present time; whereas the fact is, that there are
forty-three cases of the kind actually existing at this moment.
Now, that will not be a very large proportion of the

whole livings in Scotland, but it is a proportion not inconsiderable; it is four per cent. upon the number of clergymen in Scotland. Then, my Lords, he states “that it is attended with most important securities against abuse;” and that there are securities, and important securities, there can be no doubt. He says, “it is introduced from a necessity inherent in the very constitution of the church, and for the advantage of the people. It has no resemblance or affinity to grants of offices in reversion, and is essentially different even from the appointment of assistants and successors in any other case;” and your Lordships will see one or two observations that go considerably further, as I feel myself warranted in saying, in favour of the practice in question. That these appointments stand upon a very different footing from other appointments in reversion, I am ready to admit; but that none of the objections are applicable to them that are applicable to ordinary cases of reversions, I take leave respectfully to question. If you wait till the living is vacant, and then appoint, you have a security, as far as you can have a security, that the person best qualified and entitled by his merits will have it; but if an arrangement is entered into, by which the present incumbent does not resign, but continues to receive the emoluments, though not to do the duty, it is self-evident that a door is opened to abuse; and one of the abuses which is most likely to creep in, is the carrying down that preferment in the family of the actual incumbent. It is always a matter of arrangement, that is admitted on all hands, how much emolument shall be awarded to the assistant. One individual will take it upon lower terms than another, and accordingly an

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arrangement will be made, more with reference, in many cases, to the terms on which a man will take it, than to his qualifications for the office; and accordingly, your Lordships find of the forty-three cases existing at the present moment of assistants and successors, there are about twenty who are the sons of the present incumbents. It may very often happen that the best person to succeed is the son of the incumbent; it may very often happen that he is the best qualified as an individual, and that his very connexion as son makes him better qualified, and that his connexion with the parish gives him a right to say that he is of all men the best fitted for it; it may so happen. But it may also happen, from the arrangement between the incumbent and the assistant, if not most strictly watched over by the ecclesiastical courts, that the office would be given to a party, not so much because he is fit for the office, as because the office is convenient for him. That is an evil likely to arise in such cases; and though there are checks here that do not exist in the case of other reversionary appointments, and though one diversity broadly marks the two cases as distinguished from each other, yet, to a certain degree, they are liable to the same objections that have long since been known to exist, as well almost by the law of the land as by the practice of the Courts, to such reversionary appointments. It cannot be denied that that diversity is broadly marked, and much of the question of law turns upon it; for the person who is appointed is not only to be the successor as to the emoluments, but he is in actual possession as regards the duties; he has all the functions of the incumbent himself; he can perform all the functions in the church, administer the

sacrament, and perform the ordinary clerical duties; he has an appeal to the ecclesiastical courts, and is subject entirely to their jurisdiction; he is recognised by them as the clerical person in the church; he may be elected a presbyter; he may be a representative in the synod and in the general assembly; and in every respect whatever, as regards his clerical functions, he is in the same situation as the incumbent; but it is as an assistant and successor he is chosen. He is regularly admitted and ordained as an assistant and successor, and he continues the acting incumbent without any new ordination, by force of his ordination when he took the office of assistant and successor; he is in all respects, except as regards the emoluments, in the situation of a person who has the office *de presenti*, and not of a person who has it in *futuro*; he is in the situation of a person who has the office in possession, and not of a person who has it in reversion; but the grant of the emoluments is, strictly speaking, a reversionary grant, and to those he has no present right, except by force of the agreement between the parties, and that is sanctioned by the approbation of the patron, and by the approbation also of the ecclesiastical court. Now, this opens the argument as to the nature of these appointments. It is clear that you cannot in Scotland, any more than in England, appoint to an expectancy in the church; but then it is contended, and I think justly contended, that this is not truly to be considered an expectancy,—that it is an office in possession as regards the ecclesiastical functions,—that there may be taken to be a partial resignation of the incumbent,—that the incumbent makes a vacancy, but makes that vacancy upon the condition that he shall be immedi-

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ately re-appointed, and that the office shall be held in commission for him; and then, that instead of there being one incumbent exclusively to perform the duty, and entitled to the emoluments, there shall be two incumbents,—that there shall be one entitled to perform the duties, and one only, (namely, the successor,) but two to receive the emoluments. That is one distinction that seems to come within the dictum cited from Erskine as to ecclesiastical appointments. Then the question is, Can it be denied that the Scotch law recognises this office? I apprehend it certainly cannot; for where shall we resort to meet with the Scotch law upon this matter, except to the uniform practice of upwards of a century, to the authority of the text writers, to the decisions of the courts, and to the enactments of the legislature? I will not say that the question ever has been raised; it certainly has not. I cannot, therefore, say that it has been disposed of by decision, for it certainly has not by decision; but that the practice has been recognised again and again by decisions, and that there is no decision that denies it, is perfectly clear. Your Lordships, for instance, will find, in the case of Dunlop and Muir, two persons contending for the situation of assistant and successor; and the Court, upon a scrutiny of votes, as we should say in another case, determined in favour of one of the contending parties. In another case, namely that of Campbell and Stirling, one of the questions raised was, whether the preses had a casting vote? That question was not disposed of, because, upon a scrutiny of votes on one side, it was found that a sufficient number of those were disqualified votes, to make it immaterial whether there was a casting vote or not; and the Court

decided in favour of that claimant. Now, can it be said that the Court had the least doubt upon the legality of the appointment of an assistant and successor? Had the Court entertained the least doubt or thought that it would be a question, whether by the constitution of the Scotch church that the office of assistant and successor was recognised, would they have decided as they did? If the Court had denied the existence of the office,—if the Court had held the office to be illegal,—if the Court had not admitted the office to be legal, they never could have entered into the discussion of those questions which could only arise in the case upon the assumption that they had a legal office to deal with. The same may be said on the authority, and still more strongly, of one or two other cases, in which the Court actually awarded a portion of the augmentation of the stipend to the assistant and successor. In the Melrose case there appears to have been, from the report in Sir John Connell's book, a conflict between the incumbent himself and the assistant and successor. The minister brought a process for having his stipend augmented. Upon this process an appearance was made for the assistant; and he stated, that the whole of the clerical duties were performed by him, and craved that the Court would award to him the whole or a part of the augmentation which the minister would have been entitled to insist for had he had no assistant. Doubts were entertained with respect to the competency of the assistant's claim, as well they might; because he is only a reversioner as to the emoluments, and in possession only as to the practical part of the office; but a written consent of the whole of the heritors having been produced, the Court aug-

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mented the stipend, and appointed the whole augmentation to be paid to the assistant. The heritors consented; but they had no right to consent, unless the assistant had a right to be there. And in another case, where the curator of the minister, who was a lunatic, joined with the assistant and successor in a process of augmentation, the Court granted the augmentation, and at the same time appointed a certain proportion of the stipend to be paid to the assistant and successor. This was in the year 1830; and I will only ask your Lordships one question. It is said by the appellant, these are no recognitions, that they are no authorities to attend to, and that there may be no such things as successors and assistants recognised in the Scotch law,—that the Scotch law may know nothing of them, and that it may be wholly an illegal proceeding. It is said this may be so, notwithstanding all these decisions, in which the legal existence of this office is recognised; but I will put this question, and the same observation applies to the acts recognising assistants and successors, and particularly the 48 Geo. III., which abolishes, after a year and six months, the power of granting offices in reversion, but saves the power of appointing assistants and successors in the Scotch church. Now I ask this question—If there had been found the same dealing, either in clauses of statutes, with the offices of bishops, or deans, or archdeacons,—or if the Courts had taken upon themselves to decide between two competitors for the office of dean or archdeacon, and had said, you the pursuer have a majority of votes,—or if the act of Parliament dealing with offices had saved the right of bishops, deans, or archdeacons in the Scotch church, would it not have been thought

that presbytery was shaken to its foundation? Would it not have raised an alarm all over that part of his Majesty's dominions where presbytery, happily for that country, holds its sway? I say happily, because it is a religion rooted in the hearts of the people, and in which they have, in spiritual and moral concerns, uniformly flourished. Would it not have raised in the minds of the people of that country an alarm which no contrary decision of the Courts contradicting what had been said in that case would have allayed,—which nothing but an act of the legislature could have allayed, had such an alarm been excited by the dicta in courts, or clauses in acts of Parliament? Nay more, would it not have been well founded,—would it not have been just to hold that the courts or the Parliament actually recognised the legal existence, and by recognising their legal existence, sanctioned the lawful authority of bishops, deans, and archdeacons in the church of Scotland? It is too obvious to require a moment's further illustration. These decisions, and the language in the statutes, coupled with the uniform practice that has prevailed for the last ninety years, can leave no manner of doubt upon any reasonable man's mind, that the office of assistant and successor is recognised by the law and the practice, that the power of filling up this office ought to be most sparingly exercised, and that it is impossible to guard too rigorously against the abuse of it; and that with such practice every means should be taken, especially by corporate bodies, and most especially by those in whom is vested the high office of advising the Crown, in respect to the bestowing of church preferment, that every precaution ought to be taken to prevent even the possibility of those abuses

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creeping in, to which a door is opened by the existence of the office. I need hardly say (and after the remark I have made, indicating a slight difference between myself and the Learned Judge below, who has cast so much light upon the subject, after having made that observation which the importance of the case extorted from me as indicating a slight difference,) it is unnecessary to add more than that I am sure those precautions will continue that have so successfully been hitherto adopted, and that no abuse will ever in future be allowed to creep in, as far as human prudence and wisdom can give security. Upon the whole circumstances of this case I am of opinion that your Lordships ought to affirm the interlocutors complained of; and under the circumstances, I shall also recommend to your Lordships to allow the respondents the costs of this appeal, not exceeding 200*l*.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellants do pay or cause to be paid to the said respondents the sum of 200*l*. for their costs in respect of the said appeal.

SPOTTISWOODE and ROBERTSON—RICHARDSON and
CONNELL, Solicitors.

[16th August 1832.]

ELIZABETH REBECCA CROWDER OF TURNLEY, Appel-
lant.—*Sir C. Wetherell — Macniel.* No. 19.

ROBERT WATSON and GILBERT WATSON, Respon-
dents.—*Lord Advocate (Jeffrey) — Dr. Lushington.*

Arrestment in Meditatione Fugæ.—A married woman was brought from England to Scotland on a criminal warrant, and tried for the crimes of housebreaking and robbery, of which she was acquitted—Held, 1. That she was liable to be immediately arrested on a meditatione fugæ warrant at the instance of the parties whose property had been stolen: 2. That it was competent to obtain a second warrant, after the first had been dismissed as irregular in form: 3. That it is sufficient ground for granting a warrant to apprehend as in meditatione fugæ, if the creditor depone to the verity of the debt, and his belief that the debtor meditates flight.

IN the month of December 1830 the bank of Messrs. James and Robert Watson, bankers in Glasgow, was broken open, and a large amount of money was stolen. The appellant, whose usual place of residence was London, had been residing in Glasgow immediately prior to the robbery, and returned to London about the period it was discovered. Suspicion having attached to her as a participator in the robbery, a criminal warrant was obtained,

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and under it she was apprehended and sent for trial to Glasgow in September 1831, together with a person of the name of Heath. The jury returned a verdict of guilty against Heath, who was executed; but returned the following verdict against the appellant: —“ Find that the panel, “ Elizabeth Crowder or Turnley alias Allen, was in “ the previous knowledge of the theft, but had no participation therein.” The appellant was immediately liberated, but on the next day was apprehended as in meditatione fugæ, on a warrant from the sheriff of Lanarkshire, obtained by the Messrs. Watson, and was, after some procedure, committed by the sheriff till she should find caution de judicio sisti. The appellant presented a bill of suspension and liberation, alleging certain irregularities, on advising which with answer Lord Cringletie passed the bill. In the meantime Messrs. Watson, to avoid any risk which might arise from irregularities, and before intelligence of the bill having been passed by Lord Cringletie could have reached Glasgow, lodged a letter with the keeper of the gaol, foregoing any procedure on the warrant. They had, however, obtained a second warrant from the sheriff, and this warrant they put in execution before the appellant left the gaol.

On being brought up for examination before the sheriff, the appellant declared, “ she is advised that the “ present proceedings are illegal, and she therefore “ declines to answer all questions.” Upon that the sheriff granted the usual warrant to imprison her until she should find caution de judicio sisti, and she was accordingly recommitted to prison. A second bill of suspension and liberation was immediately presented by

the appellant, which was reported by the Lord Ordinary to the Court, and refused.*

She then appealed.

Appellant.—The principle of *meditatio fugæ* does not apply to a foreigner having no domicile in Scotland, and particularly where a foreigner is brought into Scotland by force, and contrary to his will. A foreigner is under protection of the Court, and can as little be subject to apprehension on civil process at the instance of private individuals as a party brought from the country under such warrant, who enjoys a protection till restored thereto. In the present case the respondents are barred from availing themselves of their second warrant, as the irregularity of the first was their own act; besides, the appellant has been proved to be a married woman, and so is not liable to any action for a civil debt.†

Respondents.—The legality of declaring foreigners as in *meditatione fugæ* has frequently been recognised by the Court. The crime for which the appellant was apprehended having been committed in Scotland has rendered her amenable to the tribunal of that country, and in default of her finding caution her creditors are entitled to the ordinary remedy of detaining her to answer their actions. The appellant was brought to Scotland by the public prosecutor, and although while actually in the hands of the Court she might not be liable to apprehension on a

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* 10 S. & D. 29.

† 2 Bell, 562, 3, 4, and cases there cited; *ibid.* 372; *Stewart's Ans.* p. 228; *Urquhart*, Dec. 17, 1679 (*Morr.* 19470); *Archer*, June 18, 1791 (*Morr.* 8894); *Halyburton*, July 21, 1709 (*M.* 2); *Ersk.* 1. 6. 24; *Chalmers*, Feb. 19, 1700 (*Morr.* 6083).

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civil process, still the moment she is liberated she becomes so. The appellant cannot be considered as a married woman, as the person represented to be her husband is a felon; and although she was a married woman, still she would be liable to the restitution of stolen property.*

LORD CHANCELLOR.—My Lords, this case arose under peculiar circumstances. The appellant, Mrs. Turnley, and her brother-in-law, William Heath, appear to have resided in Glasgow for several months previous to the robbery of the Glasgow bank, on which occasion property to a great amount was carried off. Heath and his sister-in-law were arrested and carried to trial; the brother-in-law was convicted and executed, and the sister acquitted, but with a special finding that she had a knowledge of the proceedings before the robbery, but was not guilty of participation, which was, in fact, a verdict of acquittal. She must to all intents and purposes, therefore, be said to be acquitted upon the charge. In about forty hours after that acquittal she was arrested on a warrant issued by the sheriff, as being in *meditatione fugæ*, and she was called upon to give bail to answer to the action which the respondents were about to bring to recover the amount of the loss they had sustained by the robbery, there being reason, as they alleged, for believing that she was in possession, or had under her control, all or part of the

* Macgregor, July 1, 1828, 6 Shaw & D. 475; Tait, June 4, 1831, 9 Shaw & D. 680; Trotter, Dec. 7, 1830, 9 Sh. & D. 144; an Englishman v. Angelo, Jan. 22, 1864 (Morr. 4825); Arnold, Dec. 1683 (Morr. 4843); Ayrie, July 6, 1701 (Morr. 4826); Hardie, Jan. 4, 1759 (Morr. 4830); Heron, Dec. 16, 1773 (Morr. 8550); Dickie, Dec. 20, 1811 (F. C.), 2 Bell, 564.

money so stolen. Not finding bail she was incarcerated. It appears that that process was informal, as the party had not made oath to the debt, and that process was abandoned. After that, a fresh process was taken out, and she was again arrested on the sheriff's warrant, and was incarcerated. She applied to the Court of Session for her liberation, by way of bill of suspension; and her application led to the interlocutors refusing to liberate her, which interlocutors the appeal has brought under the consideration of your Lordships. As I am of opinion upon the whole that it will be the duty of your Lordships to affirm the judgment of the Court below, I shall not trouble your Lordships with detailing at length the reasons on which I hold that opinion; but in consequence of one part of the argument, which was very ably urged by both the learned counsel for the appellant (the other parties not appearing), and which has been most ably met in the case on your Lordships table prepared on the part of the respondent, I think it right to deny my concurrence to the proposition, that a person arrested under criminal process, and dealt with as a criminal, and criminally tried and acquitted, has the same protection in returning from the Court which a witness would have in attending, under the process of a Court, either a civil or criminal trial in this country; and I take the law in Scotland to be, at the very least, as narrow for the privilege as the law is here. Were I to reason upon it, I should say, that the law there is more narrow in respect of that privilege, and much more strict and close than the law of privilege here. In disposing of this case one way or the other, it is not necessary to go further, but I thought it fit to state thus much; for it appeared to be assumed in the argu-

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ment, that a person who had been tried and acquitted enjoyed the same protection in returning from the Court where he was acquitted, or the gaol from which he was liberated (supposing he was discharged by gaol delivery), which a witness did in returning from a Court where he was called upon to give his testimony. But whatever protection this party might have claimed, it is perfectly clear that the protection would not continue for so long a period as she appears to have remained after the acquittal in the neighbourhood of the place where she at first was imprisoned, and afterwards took her trial. That privilege, even if she had enjoyed it (which I conceive she did not), could not possibly be extended to the period of forty hours during which she remained there. It may be as well just to mention, that a case was heard in the Court of King's Bench in January last, in which it was decided by Lord Tenterden, and all the other judges there, that no such privilege as is here claimed existed in this country, but that the rule was in conformity with that which I have stated. Into the other points of the case it is unnecessary for me to go. It is sufficient to say, that I take the view, generally speaking, which has been taken in the Court below. I shall therefore humbly move your Lordships to affirm the interlocutors generally.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House and that the interlocutors complained of be and the same are hereby affirmed.

JOHN M'QUEEN — A. DOBIE, Solicitors.

[18th February 1833.]

WILLIAM Earl of MANSFIELD, Appellant.—
Knight—Murray.

No. 20.

RALPH SCOTT, Respondent.—*The Lord Advocate*
(Jeffrey)—Keay.

Master and Servant.—A hedger and ditcher in the employment of a Scottish nobleman on his estates in England entered into a written agreement to serve him in that capacity on his estates in Scotland, at the same wages as those who were formerly employed in the same capacity on these estates had received; and the nobleman farther stated, “In addition to these, as an encouragement for his greater assiduity, Lord M. is to make him a present of “20*l*,” and the party so hired served for several years. Held, (affirming the judgment of the Court of Session,) that under all the circumstances the addition of 20*l*. was not limited to the first year of service.

Interest.—Bank interest allowed on the arrears of the 20*l*. for 19 years.

THE respondent Ralph Scott raised an action against the appellant the Earl of Mansfield before the sheriff of Perthshire, setting forth, that on the 20th of April 1810 Andrew Middlemiss, land steward to the Earl on his estate of Caen Wood, near London, and acting for the Earl, entered into a contract with the respondent (who was then a hedger and ditcher on the estate of Caen Wood), by a document in these terms:—“Memoran-

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“ dum.—It is hereby agreed and finally understood,
 “ that Ralph Scott, from the 26th May 1810, is to take
 “ and fulfil the office of hedger and ditcher on the farm
 “ and estate of Scone in a good and workmanlike
 “ manner, whereof the same conditions as his prede-
 “ cessors have already been paid are still to become his
 “ wages from the superintendent and tenants of the
 “ said farms; and, as conscious of his assiduity towards
 “ the work, as addition to the above, the Earl of Mans-
 “ field is to make him an allowance of 20*l*. per annum.
 “ Done by us at Caen Wood, 20th April 1810.”

That thereafter, on the 14th May, with the view of determining more particularly the duties which the respondent was to perform at Scone, another document was subscribed by the parties in these terms:—“ It is agreed
 “ between Andrew Middlemiss, for Lord Mansfield,
 “ and Ralph Scott, that Ralph Scott is to go to Scone,
 “ is to superintend the hay harvest, is to bind hay,
 “ and instruct others in that process; that he is also to
 “ be employed as hedger, to have the care of the
 “ ences upon Lord Mansfield’s farm, and of the fences
 “ of such tenants as do not choose to keep them in
 “ order by their own labourers. He is to receive the
 “ same wages as were paid to the hedger who was
 “ lately employed, and, when at hay harvest or other
 “ work, he will receive the wages of the country. But
 “ in addition to these, as an encouragement for his
 “ greater assiduity, Lord Mansfield is to make him a
 “ present of 20*l*.; and it is also understood that Scott
 “ is to continue in Lord Mansfield’s service at all
 “ events till Whitsunday 1811, and until this agree-
 “ ment shall be terminated by the demise of either
 “ party.”

The respondent farther stated, that in consequence of this agreement he left London, and on the 26th of May, entered on his duties of hedger and ditcher upon the estate of Scone, and taking charge of the Earl's hay harvest; that he had continued to do so for nineteen years; that he had from time to time been paid by the Earl, and by the tenants on the estate, the price of the work performed by him, according to the extent of the particular work done at the time, and the bargain of parties applicable thereto; but that although he was, over and above this, entitled to the allowance of 20*l.* per annum, it had not been paid. He therefore concluded that the Earl ought to be decerned to make payment to him of the sum of 380*l.* sterling, being the amount of the yearly allowance for nineteen years, from the 26th of May 1810 to the 26th of May 1829, with the interest that might be due thereon.

In defence Lord Mansfield stated, that the 20*l.* was promised as a present only to induce the respondent to go to Scotland, and not as an annual allowance in addition to his wages; that it had been so regarded by both parties, and particularly by the respondent himself, for although he had constantly resided at Scone for nineteen years, and had been regularly paid his proper wages, and had granted a receipt at the end of each year, yet he had never made any claim of this nature; and when, on the occasion of a change of the factor, all claims against the Earl were publicly advertised for, the respondent did not come forward with this claim. He therefore pleaded, 1st, that the contract did not imply an annual allowance of 20*l.*; and, 2d, that the consecutive receipts implied a discharge.

It was admitted by his Lordship, that in a letter

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written on 9th May 1812, by Middlemiss (who was now dead) to the respondent, he stated, in answer to a letter from the respondent, "What you mention in your last letter as Lord Mansfield's present, I consider it as per annum."

The Sheriff found, that the respondent was entitled to the allowance yearly during the time he remained in the Earl's service at Scone; but that, not having demanded payment as it fell due, he was entitled to interest only at the rate current at the bank in Perth, where the Earl's business was transacted.

The Earl afterwards removed the cause to the Court of Session by bill of advocacy; and Lord Newton, Ordinary, on the 25th of January 1831, adhered to the judgment of the sheriff, remitted simpliciter, and found expenses due. His Lordship at the same time issued the following note:—"The case is not without difficulty, but the Lord Ordinary sees nothing sufficient to induce him to alter the judgment of the sheriff. He is of opinion that the question must be regulated by the minute of 14th May 1810, and that its terms, when clear, cannot be controlled by any thing in the previous minute of 20th April. But it does not appear certain, looking at these alone, that the 20*l*., though denominated a present, was not meant as a part of the wages or allowance which the pursuer was to receive for his services during the year for which he was engaged. By the minute it is stated to be in addition to the wages which the pursuer's predecessor had been in use to receive; and, considering the circumstances of the parties, it does not seem unreasonable that an addition to this extent should have been made. Besides, the cause assigned for giving it is no less applicable to the services for subsequent years than to

“ those of the first. It is not to be given because the
 “ pursuer might be put to expense in removing to Scot-
 “ land, or for any reason exclusively connected with the
 “ year to which the missive relates, but as an encourage-
 “ ment for his greater assiduity—as a remuneration for
 “ his expected services during the year for which he is
 “ engaged. Of consequence it may be not unreasonably
 “ inferred, that if the pursuer, without any further bar-
 “ gain, continued his services, which the defender, by
 “ suffering him to do, must be presumed to have ap-
 “ proved of, he was entitled, under tacit relocation, to
 “ the continuance of the same emoluments.

“ Now, if the minute can bear this interpretation, or
 “ if its meaning is in so far doubtful, the Lord Or-
 “ dinary thinks it not incompetent to look to the previous
 “ minute for explanation. This document, which does
 “ not specify any particular period of service, expressly
 “ states the 20% to be an annual addition, and assigns
 “ the pursuer’s expected assiduity as the reason. There
 “ seems no ground to presume that Middlemiss, who
 “ had no authority from his situation to hire servants
 “ for Scotland, would have entered into such a bargain
 “ for the noble defender without some communication
 “ with him; and the much more ample and distinct
 “ specification of the nature of the work to be per-
 “ formed, contained in the second minute, may suf-
 “ ficiently account for its existence, without supposing
 “ that Middlemiss had exceeded his instructions in the
 “ first. Indeed, had he acted so improperly, it is not
 “ likely that he would have been retained as the person
 “ to make the second bargain.

“ It was argued, as proving the pursuer’s mala fides,
 “ that, having doubt as to the amount of his wages, as

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“ appears from the letter of Middlemiss to him of the
 “ 9th May 1812, he did not apply to Lord Mansfield
 “ for an explanation. But the Lord Ordinary is not
 “ satisfied that this is a fair inference. It is not stated
 “ whether Lord Mansfield was or was not at Scone in
 “ spring 1812; but if he was not it was natural for the
 “ pursuer, when his service for the second year drew
 “ near a close, to apply for an explanation to Middle-
 “ miss, the person who had made the agreement with
 “ him on the part of his Lordship, and, having learned
 “ from him that he considered the 20*l.* to be an annual
 “ payment, to conclude that this was the case.

“ The pursuer’s accounts and receipts produced have
 “ no relation to his annual wages, and contain no general
 “ discharge of what might be due to him. The accounts
 “ relate entirely to specific pieces of work, mostly drains
 “ and dressing of ground, executed in great measure by
 “ labourers employed under the pursuer, and his receipts
 “ are just for the sums specified in the accounts. It is,
 “ no doubt, somewhat strange that he should have al-
 “ lowed so many years to pass without any settlement
 “ of his wages; but 20*l.* was undoubtedly due to him,
 “ and there is just as little appearance of his having
 “ asked for or been paid this sum as there is in regard
 “ to any of the subsequent sums sued for.”

The Earl reclaimed to the First Division of the Court, who, on the 21st June 1831, pronounced the following interlocutor:—“ The Lords, in respect it appears to be
 “ the bonâ fide meaning of the parties that the allowance
 “ or present of 20*l.* was to be annual, adhere to the
 “ interlocutor reclaimed against.” *

* See 9 S. D. 780.

The Earl of Mansfield appealed.

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Appellant.—The nature of the employment which the respondent undertook at Scone was not such as to require a written agreement between the parties; and the missives founded upon by the respondent were neither signed nor authorized by the appellant, nor have they been homologated by him, in so far, at least, as respects the alleged agreement to pay the respondent 20*l.* a year in addition to his ordinary wages. But even if they are to be deemed obligatory upon the appellant, still the one which bears the date of 14th May 1810 must be held to have superseded the one dated the 20th of April 1810, and to be the sole evidence of the agreement entered into between the parties. In the agreement of the 14th May there is no ambiguity. The words exclude the notion, as far as the sum of 20*l.* is concerned, of a remuneration depending upon contract, and to be enforced in a court of law. The stipulation is, that “he is to receive the same wages as were paid to the hedger who was lately employed, and when at hay harvest or other work he will receive the wages of the country. But in addition to these, as an encouragement for his greater assiduity, Lord Mansfield is to make him a present of 20*l.*; and it is also understood that Scott is to continue in Lord Mansfield’s service at all events till Whitsunday 1811, and until this agreement shall be terminated by the desire of either party.” The “present of 20*l.*,” which was to be made by the appellant, was evidently a sum to prevent loss to the respondent by change of situation, and on the condition that he should remain at Scone at any rate for a year, so that

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there is no room to contend that this was to be an annual payment.

Nor does the letter produced by the respondent in the Court below from Middlemiss to himself, bearing to have been dated on the 9th of May 1812, support any other construction. This letter was in answer to one written by the respondent to Middlemiss several months before, the contents or the precise date of which do not appear, but it was clear that it was the respondent's own understanding that the 20*l.* was a mere donation, and not an annual payment, and that he had stated this to be his understanding in his letter to Middlemiss. But even if, according to the respondent's averment, a tacit relocation took place at Whitsunday 1811, still that must have proceeded upon the terms of the original agreement; and these directly exclude the construction of an annual addition of 20*l.* to the respondent's wages.

There is no ground for any claim of interest. That claim can be enforced only when either it forms part of the original stipulation, or when, upon demand being made for payment of a debt, there has been undue delay in complying with it. Neither of these grounds exist here.

Respondent.—At the time the agreement was made, the respondent was engaged in the business of a hedger and haymaker at Highgate near London. In this occupation his emoluments were considerable. In a letter written by him to the appellant, with a statement of his gains in England, in the express view of the agreement about to be formed, the average of the respondent's emoluments was stated to be about 4*s.* 6*d.* per day, or 70*l.* per annum.

It is thus manifest, that a proposal to the respondent to leave his employment at Highgate, and go to a remote district in Scotland, where he was to take his chance of the quantity of employment he might procure, and be paid for his labour the ordinary current wages of the country, was one which he could not accept without a considerable sacrifice, for it is proved that the daily wages which were afterwards received by the respondent at Scone ran from 1*s.* to 1*s.* 6*d.* and 1*s.* 8*d.* per day.

The fact of the respondent going to Scotland renders it highly improbable that he should have done so upon any other agreement than that which the written documents establish, viz., that he should go to Scone, and take the ordinary wages of labour for the employment he might get in the way of his business; but that, over and above, the appellant should make him a certain yearly allowance, as an equivalent for the sacrifice he was making in leaving a more profitable employment.

But there was also another reason for the proposed allowance to the respondent. The object of Lord Mansfield was, not merely to procure a labourer in hedging and haymaking, but to employ the respondent as a superintendent and instructor in haymaking. For this superintendence and instruction it was fair that the respondent should receive some allowance beyond the ordinary wages of a common labourer.

That this was the agreement is established by the written documents. The two successive missives must be held to constitute component parts of one agreement; there is no ground for maintaining that the latter missive was intended to discharge and annul the former.

The allowance which in the second missive is spoken

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But even on the supposition that the second missive is to be held to comprehend within itself the completed agreement of parties, and to be regarded as for one year only, still, as at the end of the first year nothing was said by either party as to an alteration in the terms of the contract, they must be held to have renewed their contract for another year on the same terms in all respects as for the former. The stipulation as to the allowance thus became renewed, not less than the stipulation as to the ordinary wages. If the respondent was entitled to the one for the second year under an implied renewal of the contract, he was equally entitled to the other, and so on for each succeeding year, when from year to year the same silent renewal of the contract took place.

Any argument against the validity of the claim, founded on the circumstance of the allowance not being the subject of demand till the expiry of so long a period, is neutralised by the fact that the allowance of 20*l.*, to which the respondent had right under the contract for the first year's service, was not claimed by him, and yet it is admitted to be due.

LORD CHANCELLOR.—My Lords, I do not feel it to be necessary to go particularly into the facts of this case, as they are presented to your Lordships. The Court below appears to have applied itself almost exclusively, if not exclusively, to the question arising upon the construction of the two instruments,—the minute of the 20th of April 1810, and the subsequent minute of the 14th of May 1810, as referring to and regulating the relations

in which the parties stood. Their Lordships do not appear to have raised the questions, or to have had the questions distinctly raised before them, either as to the admissibility of those two minutes in evidence, or what was intimately connected with it—the authority of Andrew Middlemiss, as given by Lord Mansfield, and in virtue of which alone he was entitled to bind his Lordship. Very great doubt might appear to exist as to the admissibility of those two minutes, and as to the extent and the nature of the authority given by Lord Mansfield to Middlemiss; but when your Lordships consider the manner in which the defence was originally made before the sheriff—from which defence and the summons the whole of those proceedings may be said to spring—I think you will be of opinion, that it must have been on a view of those circumstances that the Court below, passing over what appears to us to be so very material in the case, the admissibility of the minutes, and the binding effect of them, have confined their consideration, almost exclusively, if not exclusively, to the construction of those instruments. The defence, undoubtedly, is in some material respects different from the answer to the condescendence. If the case had stood simply on the answer to the condescendence, the question for determination might possibly have been different; but the learned Judges appear to have proceeded on the ground, that the defences contained in themselves sufficient to entitle them, upon the whole facts before the sheriff, to look upon the case as proved, so far as to present for inquiry the questions which arose upon the construction of the two instruments. The defender first says, no doubt very generally, “that he does not admit that he is or can be bound to any

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“ extent by the writings signed by Andrew Middlemiss,
“ produced with and founded on in the present sum-
“ mons;” and if it had stopped there it might have
been said that this was such a general denial as would
have put the whole matter in issue; but then he goes on,
(and this must be taken, at least I assume the Court of
Session so considered it, as a qualification of the former
statement,) “ and in particular, it is denied that Middle-
“ miss had any power to enter into the alleged agree-
“ ment with the pursuer, under which, as he avers, he
“ was to receive from the defender 20*l.* a year in
“ addition to his ordinary wages; to which extent, at
“ least, the writings founded on in the summons, in so
“ far as they may be held susceptible of such a con-
“ struction, were wholly unauthorized by the defender,
“ and have never been homologated or confirmed by
“ him in any shape.” Further on he says, “ The
“ defender has, in the outset of this paper, admitted
“ that the pursuer was promised a present of 20*l.* as an
“ inducement to go to Scotland. The defender sup-
“ posed the pursuer had got the money with his accounts
“ for work in the first year of his engagement, but it
“ would appear never to have been asked; and that he
“ has not got payment is entirely the pursuer’s own
“ fault.” I may observe, this must be taken altogether
to amount to a pretty clear admission that that 20*l.* had
not been paid. The explanation given of it is quite
satisfactory on the part of Lord Mansfield; for he
denies all knowledge that it was not paid, and he states,
that he was under the impression that it had been paid;
but, taken altogether, it amounts to an admission that
that 20*l.* had not been paid. I am quite clear, that if
that 20*l.* had been paid, or asked for at the end of the

year, and then not asked for in after years, the case of the pursuer would be very different from that which it appears at present. The defences then proceed to say, “ the 20*l*. was lately offered to him, but it was refused, “ and recourse has since been had to the present action, “ against which the defender has now to submit the “ following, among other defences and pleas in law.” Now, though these are stated to be defences and pleas in law, it is clear the Court took them into consideration also as containing implied admissions, from the qualified nature of the denials of the party. “ First,” he says, “ no agreement was ever made or authorized by the “ defender, under which the pursuer was to have 20*l*. “ a year, in addition to his ordinary wages, as libelled.” This is not a denial of the contract, but a denial only of that construction of it under which 20*l*. a year was claimed by him. Then, “ Secondly, the writings “ founded on in the summons are not obligatory on the “ defender—by whom they are not signed—by whom “ they were not authorized—and by whom they have “ never been homologated or confirmed.” Now, if it had stopped here there would have been a general denial ; but then there comes a qualification, not that they were not homologated at all—not that they were not confirmed at all,—but only “ in so far at least as “ respects the alleged agreement to pay the pursuer “ 20*l*. a year, in addition to his ordinary wages.” Their Lordships appear to have considered that this was not a denial, but only a qualified denial, and that it imports an admission of the agreement under which the party was alleged to have acted ; and as his going to Scotland, and his employment during the whole of the subsequent years, must have referred to some agreement,

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and there is no other agreement except this, their Lordships appear to have thought with the sheriff, that the whole must be taken to have been done under this agreement, which, but for these admissions, they might have submitted to a jury; and so have raised the other important point, namely, the authority of *Middlemiss* to bind the noble defender, and the admissibility of those minutes as depending upon the nature of the proof adduced. The question is not now, what would have appeared before the sheriff if a different course of pleading had been adopted on the part of the defender, but whether this did not necessarily arise out of the course of the pleadings; and I incline to think, and I presume your Lordships will think, that it was owing to this way of stating the defender's case that the sheriff came at once to a judgment upon the whole, as if the whole was before him, and did not at once direct an issue to find these facts, which would have been the obvious course, if he had not been so satisfied. If those admissions had not satisfied him—if the whole course taken by those who acted before the sheriff had not been such as to satisfy him that there was evidence—he would no doubt have ordered that issue to be tried, and then we should not have been told, as we are in this case, that it does not appear how certain matters came into the cause at all, the proper construction of which matters have been made the subject of inquiry by the learned Judges.

My Lords, whatever difficulty there may be in this first and fundamental question, I think, on the fullest consideration I have been able to give to that which alone the Court appears to have done, that I can have no difficulty whatever in coming to the conclusion at which their Lord-

ships have arrived. In the first place, the hand-writing of Middlemiss is admitted; and in the way I have stated to your Lordships, his authority to bind his principal must be taken to be proved, according to the course in which the case has proceeded. It is said, that this first minute imports a yearly payment of 20*l*., and that the second minute does not; and some question may arise as to the admissibility of the first. It may be said, that the second was to be taken as containing the final terms upon which the parties agreed, assuming that those were the terms binding on the parties. I do not think it material to consider that question, because, according to my view of the sound construction of the second of these instruments, I am clearly of opinion that the present there referred to must be taken to be 20*l*. a year—not 20*l*. once paid. Your Lordships will observe, that the whole refers to wages to be paid from time to time. Every part of it bears reference to the employment of the person who was to be employed by the year, and from year to year retained in the service of his Lordship; and construing the one part, as you are bound to do, by reference to the other parts, and taking the whole together, I think there cannot remain any doubt whatever that the present of Lord Mansfield must be a yearly present, and that, consequently, he is bound by law to make it thus good. His agent says, “he is to receive the same wages “as were paid to the hedger who was lately employed,” (I suppose a hedger by the year), “and when at hay “harvest or other work he will receive the wages of the “country; but in addition to these, as an encouragement for his greater assiduity”—not as a mere present once for all, and to pay his expenses in going down to Scotland, but, “as an encouragement for his greater

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“ assiduity, Lord Mansfield is to make him a present “ of 20*l*.” Thus there is a payment of wages, and a present as an encouragement for greater assiduity. The term present is frequently used in that way as applicable to a yearly gift or a yearly render ; “ and it is also understood”—now this bears reference to the continuance—“ that Scott is to continue in Lord Mansfield’s “ service, at all events, till Whitsunday 1811,”—that is, at all events a year,—now, at all events a year, means at least a year, and therefore contemplates his remaining probably future years,—“ and until this agreement shall “ be terminated by the desire of either party ;” consequently, this bears reference to a yearly service—to a service year after year ; and the payment of 20*l*. is to encourage his greater assiduity in earning his ordinary wages by those employments in which he was to engage.

I think nothing turns, at least nothing material, upon the circumstance to which suspicion has been attempted to be attached ; namely, his not having resorted to Lord Mansfield for an explanation of whether it was one 20*l*. or 20*l*. per annum. It appears that a doubt had been presented to his mind, and it would have appeared to be suspicious that he had not resorted to Lord Mansfield, if that were not explained by his having received an assurance which ought to have satisfied him, and which did satisfy him, from the very person with whom he had contracted, Middlemiss, that he understood (and that surely was enough to satisfy Scott) that it was a yearly payment, as expressed in the first instrument. It appears to me, that the assurance of Middlemiss was quite sufficient to account for his not resorting to his Lordship.

Then, as to the length of time during which he allowed the claim to run on without making a de-

mand, that undoubtedly is a circumstance not to be laid out of consideration ; but if the case is well founded on other grounds, it appears to me not to rebut the case arising from other circumstances. It is admitted, that he had an undeniable right to have the first 20*l.*—it is admitted that he never received that 20*l.*—it is admitted that he never claimed that 20*l.* ; and if this argument is sufficient to rebut his right to the payment for the other eighteen years, it would be sufficient also to rebut his right to that one year. My Lords, I ought to state, that not being quite satisfied with respect to the admissibility of these two instruments, and not quite satisfied with respect to the authority of Middlemiss to bind his Lordship, I would humbly recommend to your Lordships not to give costs to the respondent. I greatly regret that the form of proceedings in the first stage was not so satisfactory in this respect as it might have been ; but considering also the delay of the pursuer in making this demand for payment, these circumstances induce me to recommend to your Lordships, in affirming the judgment, not to direct the payment of costs in this case. With respect to the interest, I think, the payment not having been made year by year, the respondent is clearly entitled to that, and that the judgment in his favour must be affirmed.

LORD WYNFORD.—My Lords, I will add a very few words, in accordance with the opinion which has been expressed. I have had, from the beginning of this case, some fear lest we should be doing injustice ; but if there is any risk that justice may not be done, we have been put into that situation by the course this cause has taken in the Court below. There are three questions,—one as to the interest, in which I entirely concur with my

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noble and learned friend, that the authorities to which we have been referred clearly show, that as this money was due upon a fixed day the nonpayment of it entitled the party to the interest. The next question is, as to the authority of Middlemiss to sign these papers. We have been very properly told, that Middlemiss's authority, with reference to a contract to hire a man to serve at Scone, must be considered as a particular authority, and not a general authority, and therefore that it must be proved up to the extent to which the agent acted, the rule being here to that effect, and I apprehend it is the same in Scotland. If it is not the law in that country and in this, the law in both countries cannot be founded on the principles of reason. But the rule is, as I apprehend, in both countries, that where the authority is general you must restrain the acts within the scope of the authority, and where a man acts on special authority, you must show that the authority entitled him to act up to the extent to which he has gone; and if you cannot show in this case that Middlemiss had authority up to the extent to which he has gone, to bind Lord Mansfield to pay 20*l.* a year, the pursuer must lose that 20*l.* a year. Now that will depend upon whether those documents are to be considered as evidence in the cause. That Middlemiss had authority to contract for this man's going to Scotland is perfectly clear, for there was no contract made with any other person; and he went to Scotland; and it is impossible to suppose he would have gone had not the terms of his going been regulated by some one; therefore, Middlemiss certainly had authority to contract for his going to Scotland. But this does not carry us to the proper extent necessary. The question then is, whether the pleas do not relieve

us from the difficulty of showing that the contract under which he went is that contained in this paper. I was very much struck by an observation, that, supposing it was meant to be disputed that an authority was given to Middlemiss to make this contract, that point might have been distinctly raised before the sheriff, and he would have called upon the parties at that time, when it would have been done better than it can be now, to prove that authority; but that appears to have been taken for granted in the Sheriff Court. The authority seems to have been admitted by the pleadings in the cause; and I am sure that it is the custom, in the pleadings of Scotland, to mix up more of law with fact than we allow in this country. Upon a Scotch question, it would be a strange thing for us to take upon ourselves to say, that the Scotch Judges were not warranted in understanding the pleadings as they have done. They appear to have taken it as granted that the authority was admitted; and they have discussed the meaning of the paper, and not the previous question, whether Middlemiss had authority to execute it. The noble appellant, it appears, founded himself upon this defence. "The defender admits, that as an inducement to the pursuer to go to Scotland at the time mentioned in the summons, he was promised a present of 20*l.*, but it was never meant that such a sum was to be paid to him annually, in addition to his ordinary wages." Had it stopped there it would have admitted nothing more nor less than this: "I admit only that Scott was to go to Scotland, and to have 20*l.*;" and if the noble defender had gone on and said that 20*l.* had been paid him at the end of the first year, Scott would have had great difficulty in recovering for the subsequent years; but it appears that

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the noble defender admits (his agents, I mean, for he of course knew nothing of these matters) that it was not paid. This is not an admission that Lord Mansfield knew of any precise authority in writing, but it admits an authority to pay 20*l.* and the wages. Then the question is, was it 20*l.* to be paid once for going down to Scotland, or was it 20*l.* to be paid year by year? From what follows in the defence I think the learned Judges of the Court of Scotland were warranted in considering this to be an annual payment. "The defender does not admit that he is or can be bound to any extent by the writings signed by Andrew Middlemiss, produced with and founded on in the present summons; and in particular, it is denied that Middlemiss had any power to enter into the alleged agreement with the pursuer, under which, as he avers, he was to receive from the defender 20*l.* a year, in addition to his ordinary wages; to which extent, at least, the writings so founded on in the summons, in so far as they may be held susceptible of such a construction, were wholly unauthorized by the defender." It appears to me, that if the defender admits that the writing was authorized, it is not for him to say that it is not for the Judge but for the party to put the legal construction upon it. Then he goes on further: "The first document produced bears date the 20th April 1810, and in which it is stated that the pursuer is to have an allowance of 20*l.* per annum. The other document is dated nearly a month after, namely, on 14th May 1810. It bears no reference to the preceding agreement." This is all argument. Then he says, "It does not state that the pursuer is to have 20*l.* a year over and above his wages, but only that, as an en-

“couragement for his greater assiduity, Lord Mansfield is to make him a present of 20*l*.” He thus admits that the writing was sanctioned by him, or executed by his authority, but argues that the Court ought not to construe it in such and such a way. Again, he says, “The writings founded on in the summons are not obligatory on the defender—by whom they are not signed—by whom they were not authorized—and by whom they have never been homologated or confirmed,”—(if he had stopped there it would have done, but he proceeds) “in so far at least as respects the alleged agreement to pay the pursuer 20*l*. a year, in addition to his ordinary wages.” I apprehend, as this course was not objected to in the Court of Scotland, it was considered the regular mode there to proceed to consider what construction is to be put upon the instrument, the defender saying in effect, “I did authorize him to sign the paper, but I deny that that construction is to be put upon it which he attempts to put.” I think the best way is to consider the second paper as constituting the agreement, holding it as a rule, that where there are two papers, and one posterior to the other, it is to be considered that the parties do not mean that the first bargain was to prevail between them, but that the second was to be the agreement. Let us look then at the second paper. It is in these terms :—“It is agreed between Andrew Middlemiss, for Lord Mansfield, and Ralph Scott, that Ralph Scott is to go to Scone, to superintend the hay harvest,”—that he was not bound to do by the first—“to bind hay, and instruct others in that process; that he is also to be employed as hedger, to have the care of the fences upon Lord Mansfield’s farm, and of the fences of such tenants as do not

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“ choose to keep them in order by their own labourers.
“ He is to receive the same wages as were paid to the
“ hedger who was lately employed ; and when at hay
“ harvest, or other work, he will receive the wages of
“ the country.” Now I apprehend this man would not
have gone to Scotland, particularly when we recollect
that he was a Scotchman, and that they have not, in
general, a strong propensity to return, at least they are
not considered as disposed to return. It is not very
likely that he should be well content with the wages
which such persons were paid in Scotland, he being in
the constant employment of Lord Mansfield here, and
receiving the wages paid in Middlesex ; for though there
is no evidence given upon that, I take for granted that
the wages given in that part of Scotland, at such a dis-
tance, are not equal to those paid round London ; there-
fore, that circumstance shows that he must have some
inducement beyond the ordinary wages of the country ;
“ and when at hay harvest or other work he will receive
“ the wages of the country ; but in addition to these, as
“ an encouragement for his greater assiduity,”—it is
not for his going to Scotland, but for his greater assiduity,
which, of course, would apply to the whole time he re-
mained,—“ Lord Mansfield is to make him a present of
“ 20*l*.” This is in fact an obligation to pay 20*l*. It is
absurd to suppose that this man would have gone down
to Scotland, and then, that Lord Mansfield was to be
considered as entitled to take into consideration whether
he would pay him the 20*l*. a year. This is the language
of an ignorant person, but its import is clear. It is
plainly an annual payment of 20*l*. The document then
goes on,—“ and it is also understood, that Scott is to
“ continue in Lord Mansfield’s service, at all events, to

“ Whitsunday 1811.” It appears to me, that it was intended that this man was to go down to teach the Scotchmen the making of hay, and the making hedges and ditches, in the modes practised in England, and that he should have 20*l.* by the year. Then, of course, if he was to be continued another year, he was to be so continued on the same terms as he had gone through the first. I think this is plainly the import of the terms. He is to continue in Lord Mansfield’s service, at all events, till Whitsunday 1811,—he was not to have his 20*l.* unless he continued one year—“ and until this “ agreement shall be terminated by the desire of either “ party.” If his service is to continue, what else is to continue? the whole of this agreement till the desire of either party. Then what is the whole agreement? Why, the ordinary wages of Scotch labourers and 20*l.* as long as he remains. This agreement is renewed year by year upon the same terms. Then the only remaining question in the cause is, whether a sufficient reason has been given why this man lay by and did not demand this sum? I think there has. But it is argued that he must not place Lord Mansfield in a worse situation by lying by. I think he ought not; and on that ground I agree with my noble friend, that he ought not to have his costs, and for this among other reasons—because it appears that the judgment was one attended with considerable difficulty. The Lord Ordinary expressed great difficulty, and one or two of the other learned Judges in the Court below expressed great difficulty. When Judges do express difficulty in coming to the decisions they are called upon to pronounce there is an encouragement to the party to appeal; and I agree in that which my noble and learned friend has expressed, that in this

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No. 20. case, though this judgment should be affirmed, it should
18th Feb. be affirmed without costs.
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The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors therein complained of be and the same are hereby affirmed.

SPOTTISWOODE & ROBERTSON—MONCREIFF, WEBSTER,
& THOMSON, Solicitors.

[1st March 1893.]

WILLIAM TAYLOR, late of Nethermaines, Appellant.— No. 21.
Lord Advocate (Jeffrey).

The Rev. RICHARD RAINSHAW ROTHWELL, and others,
 Trustees for the Creditors of Sir WILLIAM CUNING-
 HAM FAIRLIE of Robertland and Fairlie, Baronet,
 Respondents.—*Sir Charles Wetherell—Wilson.*

Bankruptcy — Process — Caution. — Circumstances under which (reversing the judgment of the Court of Session,) a bankrupt whose estate was under sequestration was held not bound to find caution for expenses of process as a condition of being allowed to defend himself against a declarator of irritancy of a lease.

IN 1812 Sir William Cuninghame Fairlie let to John and George and William Taylor, and their heirs, “ but “ secluding assignees and sub-tenants, under whatever “ denomination, legal or voluntary, without the con- “ currence of the proprietor in writing,” the coal upon the lands of Fairlie in the county of Ayr, under certain reservations and conditions with regard to the working, for the space of twenty-four years, and the lifetime of George Taylor, if he should survive that period. The rent was 500*l.* yearly, payable quarterly, at Candlemas, Whitsunday, Lammas, and Martinmas, (excepting for the first year, during which the rent payable was to

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No. 21. be only one half of that sum,) or, in the option of
 1st March the landlord, a lordship of one eighth part of the
 1833. prices of the coal. The lease contained a clause
 TAYLOR to the following effect:—" And further, if it shall
 v. " happen that the said tacksmen or their foresaids
 FAIRLIE'S " shall fail in the regular payment of the said respec-
 TRUSTEES. " tive shares or moieties of said rent at the terms at
 " which the same become due, so as that two quarters
 " payment thereof shall at any time be due when
 " a third becomes current, then and in that case
 " the said tack shall ipso facto become void and null,
 " without any process of declarator to be used for that
 " effect; and it shall thereupon be in the power of the
 " said Sir William Cuninghame Fairlie and his fore-
 " saids to enter into the possession of the whole pre-
 " mises themselves, or otherwise to dispose thereof as
 " they may think proper, in the same manner as if
 " this tack had never been granted, or had finally
 " determined and been at an end."

In 1814 John and George Taylor assigned their interest in the lease to William Taylor, who continued in possession till 1816, when he assigned the lease to Messrs. Fulton and Neilson of Glasgow as trustees for the benefit of his creditors. These assignments were made without the consent of the landlord. In April 1818 the trustees abandoned the colliery, and William Taylor, as was alleged, resumed possession of it; but upon his deserting it shortly afterwards John and George Taylor presented a petition to the sheriff of Ayrshire, praying to be admitted to the management of the colliery, and they were accordingly, in May 1818, reinstated in possession by the sheriff's warrant, and the possession so continued till 1824. In 1819 sequestration under

the bankrupt act was awarded against William Taylor; and James Kerr, accountant in Glasgow, was appointed trustee on his sequestrated estate. John Taylor afterwards died, and his estates were sold under a ranking and sale before the Court of Session, and found inadequate to pay his debts. In 1823 George Taylor's affairs also became involved.

At Martinmas 1824 the tenants, as was alleged, stood indebted to Sir William C. Fairlie and his trustees in the rent of four quarters, besides previous arrears. The rent stipulated by the original lease (namely 500*l.*) had been subsequently restricted by the landlord to 400*l.*, though by no formal document, and for no fixed period; and it had been so restricted for the year in which the alleged arrears were incurred.

Under these circumstances the trustees for the creditors of Sir W. C. Fairlie, and the latter for his interest, raised before the Court of Session an action of declarator of irritancy in March 1825 against George Taylor, John Taylor junior, the heir of the former tenant, and his curators (he being a minor), William Taylor, Messrs. Neilson and Fulton, and Mr. Kerr, narrating the failure to pay the rent at the stipulated terms; and that, "besides former rents, there was due to the pursuers, at the term of Martinmas 1824, the sum of 400*l.* sterling on account of the said colliery, being a full year's rent, or the rent for four quarters, as the same was restricted, and payable for the said year or for four quarters, and interest on each quarter's payment from the respective terms of payment until paid, whereby the irritancy declared in the foresaid tack has been incurred, and the said tack has become void and extinct in all time coming;" and thereon

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it concluded that it should be found that the foressaid rents were due, "at least that they are resting and owing to the pursuers, two quarterly payments of the foressaid yearly rent as restricted, while a third has become current; and that the said defenders have thereby contravened the terms of the said tack, and incurred the irritancy foressaid;" and that they should be decerned to remove from the occupation of the subject.

Defences were lodged for Messrs. Neilson, Fulton, and Kerr, objecting to any decree going out against them personally for rents due from the colliery, on the ground that they had nothing to do with the subject during the time for which the rents mentioned in the premises had fallen due. No defences were at first lodged for William Taylor; and the Lord Ordinary, while he assolizied Messrs. Neilson, Fulton, and Kerr "from any claim for the rent of the year at and preceding Martinmas 1824," quoad ultra decerned and declared in terms of the libel.

William Taylor, having afterwards represented against this interlocutor, was allowed to lodge defences, and a record was made up. The Lord Ordinary thereafter, on the 18th December 1827, decerned and declared against William Taylor in terms of the libel, and found him liable in expenses.

He then presented a reclaiming note to the Second Division of the Court, who appointed him to lodge a condescendence before answer with reference specifically to the allegation that the arrears were not due. A condescendence was accordingly lodged, and the pursuers then maintained, that as William Taylor was a sequestrated bankrupt, they were not bound to

litigate farther without his finding caution for the expenses of process. The Court, on the 4th December 1829, pronounced the following interlocutor:—"The Lords
 " having advised the cause, and heard the counsel for
 " the parties, before further proceeding, et ante omnia,
 " ordain the defender to find sufficient caution for the
 " whole expenses of process on or before the third
 " sederunt day in January next, and appoint the cause
 " to be then put to the roll for further advising."

Taylor then applied for leave to appeal, but this was refused (3d March 1830), and no farther appearance being made by him, the Lord Ordinary's interlocutor was adhered to on 6th March.*

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William Taylor appealed.

Appellant.—There are two questions raised by this appeal: 1st, whether the appellant, against whom an interlocutor of the Lord Ordinary has been pronounced, decerning against him in terms of the libel, is entitled to be heard against that interlocutor without finding caution for expenses of process; and, secondly, whether the Lord Ordinary's interlocutor, decerning against him in terms of the libel, be well founded on its merits. As to the first, there is no rule in law which renders it necessary for a party called as defender in a suit to find caution for the expenses of the pursuer, although he may have been rendered bankrupt previous to the institution of the action. A defender in a declarator is *ex hypothesi* in possession, and the action can be brought only either to alter the mode of possession, or

* 8 S. D. 666.

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to strip the possessor of the right altogether. The defender must be entitled to defend effectually; and though one may have suffered the misfortune of bankruptcy, he is not to be held as ipso facto excluded from the right to defend himself. The principle is the same as to whether the defender is prohibited absolutely from stating his defence, or has such conditions attached to the exercise of his right as render it difficult or impossible. In the case of a bankrupt it is very nearly the same, whether he shall be prohibited absolutely, or whether he shall be prohibited indirectly, by being subjected to the necessity of finding security for expenses. A bankrupt cannot in almost any case be expected to obtain solvent securities.

It is clear, therefore, that so serious and severe a disability cannot be presumed. Its existence as an established principle of law must be shown before it can be permitted to operate to the disadvantage of the parties against whom it is pleaded. Now, this disability is not imposed by statute nor by common law, nor is it recommended by any principle of expediency; and if any such rule did exist in ordinary cases, it would be inapplicable to the present.

It is admitted that the practice of the Court has rendered it imperative on bankrupt pursuers to find security for the expenses of actions instituted for the purpose of making effectual claims, which, after having been transferred by the sequestration to their trustees, have been re-assigned by the trustees to them. This practice was introduced and has become established for two reasons, neither of which applies to the situation of the appellant. In the first place, it has been held inexpedient to favour a suit carried on by assignation from

the trustee, because, if suits were favoured, trustees would in all doubtful cases make fraudulent or at least deceptive assignments to the bankrupt on mutual understanding or expressed condition, and subject the parties against whom the claim lay to the oppressive necessity of contesting with an insolvent, not really in the right which he is attempting to make good, but acting for a party who remains in the back ground.

And, in the next place, since the trustee must make available for creditors all the rights vested in the bankrupt, and cannot, consistently with his duty to them, surrender or part with any right of value, there is a plain and strong presumption against the validity of the claim; and the pursuer may be very naturally looked upon as engaged in an attempt to enforce a claim which he got right to enforce only because it was weak and desperate.

In the present case the right which is attempted to be cut down was all along in the person of the appellant, and never vested in the trustee; and the appellant is not suing for the establishment of any claim, but maintaining possession against a claim preferred against himself.

The lease was granted to the appellant and his brothers on condition that assignees and sub-tenants, legal and voluntary, should be excluded. The trustee was never recognized by the landlord; the legal assignment under the bankrupt statute was inept in so far as it attempted to convey any right to the lease, and accordingly the trustee gave up possession only because he had no right to maintain it.

The appellant was never divested. There was no room for the presumption, therefore, which might have

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been fairly raised had the right to the lease been in the person of the trustee, and he had denuded in favour of the bankrupt. There is no ground for holding the claim, *ex facie*, weak and untenable, and there is nothing to affect the ordinary and reasonable presumption by which the situation of one in possession is favoured by the law. Just as little reason is there for any imputation of fraud in relation to the trustee's abandonment, as his surrender does not arise from any inclination of his, but from his inability to get the right effectually vested in his own person.*

But further the plea, if a good one, fell to be stated in limine. Nothing has been more settled in the law than that a defender, by stating peremptory defences or defences upon the merits of the case, virtually abandons all the dilatory defences which might have been competently pleaded by him. The law has been thus fixed upon the principle, that no one can be allowed in equity to lead his adversary into the expenses of litigation, which would have been stopped at the outset by a statement of the proper defence. The principle applies equally in the case of a pursuer who joins issue with the party whom he calls as defender upon the merits. The respondents did not, at the first calling of the cause, insist for or demand security for costs. It was only after issue had been joined on the merits, and at a time when the success of their case upon the merits appeared doubtful, — after a great expense had been incurred, and incurred upon the faith of the contract of *litis-contestation*, — that the plea was resorted to. As

* *Barry v. Geddes*, 5 S. & D., 727, (New Ed. 678); *Clark v. Ewing and Brown*, May 20, 1813, F. C.

the appellant had been notoriously bankrupt before the suit was instituted, and was known and stated to have been so from the beginning, there is neither any ground for error as to the fact, nor excuse for delaying the plea.

As to the second question;—the interlocutor of the Lord Ordinary is not well founded on the merits, inasmuch as it was pronounced without any inquiry into the validity of the defence pleaded by the appellant, which was clearly relevant, and ought to have been admitted to probation.

The ground of the action was an alleged arrear of rent at the term of Martinmas 1824, amounting to 400*l.*, more than three quarters' payments of the rent stipulated. The existence of any such amount of arrears was from the first denied, and partial payments were alleged to have been made, by which the amount of debt was reduced to a sum greatly less than that which was necessary to justify the application of the clause of irritancy. There was farther alleged, in compensation, an unpaid account for coals furnished to the constituent of the respondents during five years, and a very large debt due by that individual to two of the parties holding the lease. It is impossible to maintain that these averments were not relevant, if proved, to elide the conclusions of the libel.

Respondents.—The appointment on the appellant to find caution for expenses before being allowed to be heard against the judgment obtained against him before the Lord Ordinary is consistent with the established practice of the Court and the equity of the case. When a sequestrated bankrupt attempts to pursue an action

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in which his trustee refuses to concur, it may be said that his residuary interest in the trust funds gives him a sufficient title; but as it would be manifestly unjust to compel a party to litigate with him who had no means of recovering his expenses from him, in the event of success, in consequence of his being already divested in favour of his creditors, the invariable rule has been in such cases to compel the bankrupt pursuer to find caution for expenses.*

The same rule applies to the case of a bankrupt defender under sequestration. The sequestration vests the trustee directly with the effects of the bankrupt, and gives him the most immediate and strongest interest to defend the estate from a claim made against it, if it appears to him that a defence is tenable. If the trustee had litigated, the respondents would have had the security of the funds in the sequestration; but if he declines, and a party sists himself who is divested of all his funds by the sequestration, security for expenses must be found by him as a necessary preliminary to his being allowed to plead. On this principle the Court have always acted.†

But it is said that the present case is not within the general rule, because the right to the lease was declared not to be assignable, either voluntarily or judicially; that it could not, therefore, pass to the trustee under the sequestration, but still remains a subject vested in the person of William Taylor; that the trustee's declining to appear, or his allowing decree to pass against him, is of no consequence, as he had no interest to appear; and therefore it is inferred that the appellant ought to

* 2 Bell's Comm. 412.

† Lyell v. Mudie, Dec. 1, 1829; 8 Sh. & D. 122.

be allowed to defend exactly as if his estate had not been sequestrated at all.

This distinction is however without foundation; for, first, though assignations are declared by the lease to be prohibited, except with the landlord's consent, this is a clause conceived in favour of the landlord only. If he object, the assignation is bad; if he consent, the assignation is effectual, whether the cedent attempt subsequently to recall his assignation or not. The bankrupt who has granted the assignation in favour of his trustee cannot challenge that assignation if the landlord does not; and the landlord, instead of challenging it in this case, gives his consent to it by calling the trustee under the sequestration as a defender in the action.*

But, secondly, even supposing that the right of the lease was never taken out of William Taylor by the sequestration, the objection to his being allowed to defend, without finding caution, would equally remain. The objection rests upon the ground, that a person who has been divested by bankruptcy and sequestration of his funds (no discharge having been obtained by him) has no right to litigate, without affording his adversary security for payment of his expenses. The sequestrated funds are devoted to the payment of debt contracted prior to the sequestration. An account for the expenses of a process, begun after the sequestration, could not even afford a ground for ranking on the sequestrated funds with other creditors. Hence a party in the situation of the respondents would not even have the remedy of ranking upon an inadequate fund for the expenses that might be found due to him.

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* Hay v. Hood, Dec. 8, 1801, Mor. 15,297.

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As to the second question in this appeal, the interlocutor of the Lord Ordinary is correct upon the merits.

The right to the lease of the colliery, which originally belonged to the appellant, is entirely extinguished by the decree obtained against the trustee, to whom the appellant's right had been judicially assigned, the landlord alone being entitled to object to the validity of such assignation, and he having recognised its effect by calling the trustee as a party to the present process.

The appellant, therefore, had no title to resist the judgment of the Lord Ordinary; neither can the appellant found any defence upon his alleged exclusion from possession of the colliery, that being an act in which the landlord had no share, and for which, if illegal, the appellant's remedy lies against the parties on whose application he was excluded.

Lastly, none of the averments made by the appellant are relevant to show that the rents alleged in the summons to be due were paid.

LORD CHANCELLOR.—My Lords, I will not at present trouble your Lordships with the view I take of the main question in dispute between these parties, but although the judgment I am about to propose for consideration will not finally decide the question, yet I hope it will not lead to further litigation between the parties. I shall now proceed to state the grounds on which I shall call upon your Lordships to come to a different conclusion from that which has been arrived at by the Court below.

There were these parties in the original suit,—Neilson and Fulton as trustees for the creditors of William Taylor, and James Kerr as trustee on his

sequestrated estate. Neilson and Fulton were the trustees to whom he had assigned his lease, for the benefit of his creditors. They took possession, but afterwards abandoned it; on which Taylor re-entered. The pursuers themselves made the bankrupt a defendant in the suit. When it was first brought into the Court below all the trustees disclaimed any interest in the disputed property, and Taylor did not appear, in consequence of which the Lord Ordinary pronounced this interlocutor:—"Assolzie the defenders, John Neilson, John Fulton, "and James Kerr, from any claim for the rent of the "year at and preceding Martinmas 1824; and quoad "ultra decerns and declares in terms of the libel: Finds "the above defenders entitled to their expenses." What is this but a calling on the parties to give up their title to the property in every respect; for it decerns and declares in terms of the libel? Now, let us consider for a moment in what a situation this left Taylor, who was made a defendant by the pursuers. There was a judgment giving to the other defendants their expenses; but as to Taylor, there was a judgment against him in terms of the libel. I find, that if it is a decree in absence, it imports a finding of expenses, and that a decree in terms of the libel is held in practice tantamount to a finding of expenses in general terms. It is clear that this finding burdens Mr. Taylor with the expenses of the suit. Again, by the interlocutor of the 18th December 1827; after Mr. Taylor had met the parties in Court, he, Mr. Taylor, was found "liable to the pursuers in expenses," of which an account was appointed to be given in, and, when lodged, remitted to the auditor to tax the same, and to report; so that, at all events, here is Mr. Taylor made a defender, and put to expenses.

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Now, can it be said, on any view whatever of justice, that a party has a right to bring another into Court and get a judgment against him in his absence, which may saddle him with the expenses of the suit, if that party is debarred from coming in? It is said that Taylor appeared by his own trustees, and that he had no right himself to appear at all. On this point I have very great doubt, for I do think that Mr. Taylor had an interest; but it is quite unnecessary to stop at that, for undoubtedly he had at least an interest in not having judgment passed against him, or, at any rate, one which saddled him with expenses. I will now shortly state the judgments of the Court below, after the hearing of the arguments on the merits of the case.

The first is on the 18th of December 1827, and which was pronounced as follows:—"The Lord Ordinary having heard, &c. decerns and declares against the defender, William Taylor, in terms of the libel: Finds him liable to the pursuers in expenses, of which appoints an account to be given in, and when lodged, remits to the auditor to tax the same, and report." He then reclaimed to the Second Division of the Court, when their Lordships pronounced the following judgment, on the 6th of February 1829:—"The Lords having resumed consideration of this case, and heard the counsel for the parties, appoint the defender, William Taylor, within three weeks from this date, to lodge a condescendence before answer, and therein to state, specially and articulately, the grounds and evidence on which he alleges that the arrears, stated in the summons as due at Martinmas 1824, were not due, as averred, and also the means of proof by which he proposes to establish his allega-

“ tions ; and sist James Miller, writer in Edinburgh,
 “ in room of the late Robert Burnett, as trustee for the
 “ creditors of Sir William Cuninghame Fairlie, Bart.”

This is a judgment of the Court itself, which lets in Taylor without stating any terms or conditions. It is an interlocutor which leads Taylor on to further expenses. Thus the Court is itself a party to the drawing Taylor on in the suit, but afterwards it stops him short in the prosecution of it. Then comes the interlocutor of the 4th of December 1829, which is in these terms :—“ The Lords having advised the cause, and heard
 “ the counsel for the parties, before further proceeding,
 “ et ante omnia, ordain the defender to find sufficient
 “ caution for the whole expenses of process on or before
 “ the third sederunt day in February next, and appoint
 “ the case to be put in the roll for further advising.”
 On this Taylor presented a petition for leave to appeal against the interlocutor, but the petition was refused, and on the 6th of March 1830, the Court pronounced the following judgment :—“ The Lords having heard
 “ the counsel for the respondents, in respect of no ap-
 “ pearance for the defender, William Taylor, and of
 “ the former procedure, refuse the desire of the reclaiming
 “ note ; adhere to the interlocutor submitted to review,
 “ and decern.”

Now by these judgments your Lordships perceive Taylor is precluded from proceeding in his cause. If, in the opinion of the Court, it was found necessary to stop this cause, even then I think they should have gone on other grounds. They should have gone on the ground that Taylor was not liable to these proceedings. Mr. Taylor petitioned the Court against the interlocutor of the 4th December, the prayer of which

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petition was refused. Therefore, he was perfectly regular in appealing to your Lordships against that finding, which was clearly a decerniture fixing him with the expenses due. If, indeed, there was any practice in the Scotch Courts which would allow a plaintiff to call on a defender for a security for expenses in a case in which the defender was brought into Court, I should have my doubts as to the justice of that practice; for I own I am unable to apprehend how such a practice should prevail, one so inconsistent with the ordinary principles which govern the proceedings of courts of law, nay, so repugnant to natural justice;—still, if it had become the practice of the Courts, I should have been exceedingly slow in giving a judgment which would go against an established course of procedure. But I find there is no such practice; I find it even varies very considerably in cases where pursuers are called on to find caution; but in all cases where a defender is called on, there is no such practice, and therefore it appears that this is the first case on record where such security has been required from a defender, if I except the case of *Lyell v. Mudie*, on which I shall presently remark. I do not see any case in which a defender is to be prevented from proceeding in his defence, whether such prevention should be offered at an earlier or a more advanced period of the cause, but more particularly so, when the party has been drawn into that cause by the judgment of the Court itself, which, at the latest period, precludes him from proceeding in his defence, by imposing upon him a condition with which he is unable to comply. I can see no reason why, in any one of these three stages of the proceedings, the Court ought to put a defender upon terms, who comes compulsorily into Court.

Another case has been mentioned where a decision was given something like the present; but that case, in point of authority, is upon the same level with this. It was one decided by the same Court only a few days before, this judgment having been given on the 4th December, and that having been pronounced on the 1st December. It is to be found in the 8th volume of Shaw and Dunlop's Reports, page 153; and it gives to the decision under appeal a support which is very slender indeed. It only shows that their Lordships held the same doctrine on the 4th that they had held on the 1st; and that those learned persons did deliberately and advisedly intend to adopt the principle, and assert their right to make a defender find security for the costs of the suit. Further than this that authority does not go; it leaves the present judgment cloathed with no additional claims whatever to our respect. But when your Lordships look to the case of *Lyell v. Mudie*, it differs in a very material respect. It is not the case of a defender being found subject to costs, but it is that of a person under different circumstances; for Mr. Lyell could scarcely be said to stand in the situation of a defender at all. Mudie was called the suspender; he therefore was substantially the pursuer (for Lyell was the charger), and as such came voluntarily into the proceedings. There are other points in that case which vary it from this: for instance, even if it had been standing in the books for a great length of time, yet it would, on its own merits, have wanted that which could have given it authority for ruling the present decision. It is a case in which one party puts another party to a great expense by a vexatious proceeding (he being a tool in the hands of a professional man), without

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 1st March (a man of wealth), who, whilst he would in case of a
 1833. defeat be called upon for costs, in case of success would
 TAYLOR have no chance of obtaining them from his opponent.
 v. This matter has been a subject of much discussion before
 FAIRLIE'S the Common Law Commissioners, who have considered it
 TRUSTEE. a matter of so great difficulty that at present they have
 come to no decision upon it; for although a case such
 as I have put is one of great hardship, yet the danger
 would arise of a man being prevented under different
 circumstances, and not having the means of finding
 security for costs, from coming into Court. Such a case
 as the one I have named may have occurred; but I have
 never seen one in which a defender has been made liable
 in security of costs in case of defeat, and who has been
 thereby precluded from coming into Court to make his
 defence. In these circumstances, my Lords, I do not
 think there is a doubt that there has been a miscar-
 riage in the Court below. I shall therefore recommend
 to your Lordships to reverse the interlocutors of the
 4th December 1829, and the 3d and 6th March 1830,
 and to remit the case, with directions to proceed on that
 reversal. By this judgment your Lordships will enable
 the defender, Mr. Taylor, to proceed without finding
 security for the costs.

My Lords, I by no means would be understood as
 saying, that there are no cases in which a security for
 the payment of costs may not be requisite;—for instance,
 in case of bankruptcy, if a bankrupt should take a case
 out of the hands of his trustee at a time when he was
 well and properly represented, and should persist in
 going on with a vexatious litigation, contending with a
 party sufficiently competent to pay the costs, I by no

means think that this may not be a case where the Court might call on a poor party so vexatiously acting to find security for the costs. But on the grounds which I have already stated, I am clearly of opinion, that in this case Mr. Taylor ought not to be bound to find security for the costs; and I must add further the expression of my opinion, that if ever there was a case where it was beneficial for all parties that the matter in dispute should be settled out of Court, this is that case.

LORD WYNFORD.—My Lords, when I heard this case argued I could not but think there was some practice in Scotland which prevented this party from proceeding in the cause. I have, with the noble and learned Lord, inquired into that point, and I find this is not the case. There are in this case two questions,—first, whether this defendant could have been called upon to pay costs at any time? and, secondly, whether he could, in this cause, be stopped in his defence by not finding security for those costs? This is a question as to whether the defender is entitled to an estate. The defender comes in and says he has a right to claim, and he pleads that right. A judgment is given against him in his absence, but he is afterwards permitted again to come into Court, on paying two guineas as costs to the pursuer. But, after a defence of three or four years, the pursuer insists on the defender giving security for the costs, before he proceeds any further in the defence. The Court agree to that, and then two judgments are given. If that is the law, I would ask, what would be the situation of many persons? If you could bring a man into a court of law, and turn round upon him after such a lapse of time, and ask for security for costs, before you allow him to proceed in his defence, what would be the effect? If

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a man brings an action against a person of even considerable estate, and that estate is the subject of the action (that person having no other property), and the title of that estate being necessarily involved in the suit, how could he give that security? and if he did not give it, what must be the consequence? Why, the plaintiff or pursuer might take that estate from him without his having an opportunity of giving an answer. I must admit that in some cases parties may be required to give security, whether they appear in the character of plaintiff or defendant, but at the same time I am aware that the Common Law Commissioners did not feel themselves justified in recommending that parties should be called upon to give such security. I brought in a bill in order to enable parties, in the case of a litigious plaintiff, to call for security, in order to prevent him from going on with a vexatious suit, or in the case of a litigious defendant, who, by keeping a plaintiff at arm's length, may put him to considerable and unnecessary expense; but I have not thought it safe to give that power to any Court, except in the case of a litigious and vexatious plaintiff or dishonest defendant. Nothing of that sort appears in the present case. Here is a party claiming a very important interest. This suit was instituted to get possession of a property which Taylor holds by lease, but which lease his trustees have repudiated. He contends that the lease is not void, although the other party contends that it is put an end to by nonpayment of rent, according to the terms of the agreement. This he disputed, as well as that it is void by his assignment to the trustees. If they did not think proper to take the necessary steps for the recovery of the same, or for the keeping possession while they had

it, still that did not bar the defender, who considered it as a very beneficial lease, in which he had a right and interest to defend. It has been said, that this has been decided by the old appeal of *Taylor v. Fairlie**, but that does not decide this case; for in that case there were three parties concerned, and it was decided upon a mere technicality, that one only could not maintain the action. Therefore, the case of *Taylor v. Fairlie* does not decide this case. So it appears to me, that it cannot be said that this man has no beneficial interest in the suit. But how does the case stand? He is allowed to come into Court on a certain condition, which is performed; they allow him to go on for two or three years, and then they stop him, by calling upon him to find security for the costs. They allow him to come into Court on paying two guineas. He goes on, incurs considerable expenses, and then after three years, although he has conformed to the only condition imposed on him on coming into Court, they turn round upon him and say, that he shall not go on, without furnishing them with security for the costs. Now, I do think this is contrary to every principle of justice. I am aware that the laws of Scotland are not regulated by those of this country; but I do hope they are founded on common sense and common justice. Now, in this case, the man was out of the country at the time the cause was brought on; notwithstanding that, on his petition, he was allowed to come into Court, and to defend his interest over a period of three years; and yet after this, in this last stage of the proceedings, he is turned round upon and told that he shall not proceed, unless he will find security for the costs. My Lords, in such a case, I should be more

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willing to stand by what is the practice of this country; than that which is said to be followed in Scotland. I do not think the case of *Lyell v. Mudie* can have any weight in the consideration of the present case. I am always extremely sorry when I am obliged to advise your Lordships to reverse a judgment of the Courts of Scotland; but I do feel myself compelled to say, that it is impossible that this judgment can be supported on any principles of law or of justice; and I shall be very glad, with my noble and learned friend, to see this cause put an end to extrajudicially; for whatever may be the value of the estate, a continuation of this litigation must seriously affect the interest of the parties, and the property in dispute.

LORD CHANCELLOR.—My Lords, the judgment which I shall propose to your Lordships is, that the two interlocutors of the 4th of December 1829, and the 3d and 6th of March 1830, be reversed, and the cause remitted to the Court below with instructions that they allow the defender, William Taylor, to proceed with his defence, without finding such caution as was required by the judgment of the Court.

The House of Lords ordered and adjudged, That the several interlocutors of the Court of Session, of the Second Division, dated the 4th December 1829 and the 3d and 6th of March 1830, complained of in the said appeal, be and the same are hereby reversed: And it is declared, That this House does not give any opinion upon the interlocutor of the Lord Ordinary, dated the 18th December 1827, and also complained of in the said appeal; but remits to the said Second Division of the Court of Session to proceed in the said cause as from the date of 6th February 1829, and to allow the said appellant to proceed in his defence in that Court, without calling upon him to find caution for expenses of process.

A. DOBIE—ANDREW M. M'RAE, Solicitors.

[5th March 1833.]

NORTH BRITISH INSURANCE COMPANY, Appellants.—
Lord Advocate (Jeffrey).

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JOHN BARKER, Respondent.—*Murray.*

Insurance—Loan.—A life insurance company lent a sum on condition that the debtor should insure his life with their office to the amount of the debt, and assign to them the policy of insurance; and they took the debtor and his cautioner bound to pay the principal and interest and premiums of insurance. After the debtor's death, they charged the cautioner to pay the sum lent, on the allegation that the policy had been allowed to fall by nonpayment of the premiums; and the cautioner alleged that the manager of the company had accepted from the debtor a bill for the premiums, and agreed to renew the policy. The Court of Session suspended the charge, but the House of Lords remitted, with directions to investigate the facts.

IN May 1825 the late Mr. James Lyon, writer in Edinburgh, applied to the appellants for a loan of 2,500*l.*, which they agreed to upon the following security:—first, of the personal engagement of himself and the respondent, John Barker, for payment of the debt; second, of an assignation of a remote and partly a contingent interest in the reversion of the succession of a Mr. Thomas Ferguson lately deceased, but which could be of no avail during the lifetime of his widow; thirdly, of an assignation of a policy of insurance upon Mr. Lyon's own life for 2,500*l.* In accordance with this arrange-

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ment, Mr. Lyon and the respondent granted their bond to the appellants for 2,500*l.*, and Mr. Lyon assigned his reversionary interest in Mr. Ferguson's estate to the appellants, and likewise the policy of insurance which had been effected with the appellants. The bond was in the following terms:—"I, James Lyon, solicitor before the

" Supreme Courts of Scotland, grant me instantly to

" have borrowed and received from the North British

" Insurance Company, incorporated by royal charter

" under that title, the principal sum of 2,500*l.* sterling,

" whereof I hereby acknowledge the receipt, renoun-

" cing all exceptions to the contrary; which sum of

" 2,500*l.* sterling I, the said James Lyon, as principal,

" and I, John Barker, surgeon in Edinburgh, as cau-

" tioner and surety, and full debtor for and with the

" said James Lyon, hereby bind and oblige ourselves,

" conjunctly and severally, and our respective heirs,

" executors, and successors, to repay and again de-

" liver to the said North British Insurance Company,

" or to the assignees of that incorporation, and that at

" the term of Martinmas next, with the sum of 500*l.*

" of liquidated penalty, in case of failure, and the legal

" interest of the said principal sum from the date

" hereof to the foresaid term of payment, and there-

" after during the notpayment of the said principal

" sum," &c. It is then stated that "it was part

" of the treaty for the said loan that I (the said James

" Lyon) should insure my life during its whole period

" for the amount of the said loan, and should assign

" the policy of insurance to the said North British In-

" surance Company in farther security thereof; and I

" having, in implement of the said arrangement, effected

" a policy of insurance upon my life for the remainder

“ thereof with the said North British Insurance Com-
 “ pany to the foresaid extent of 2,500*l.*, conform to
 “ policy No. 26., with participation of the profits, dated
 “ the 18th day of May 1825, by which policy the
 “ annual premium of the said insurance amounts to
 “ 73*l.* 0*s.* 5*d.*, and is payable upon the 4th day of May
 “ annually, therefore I do hereby transfer, assign, con-
 “ vey, and make over from me, my heirs, executors,
 “ and representatives whomsoever, to and in favour of
 “ the said North British Insurance Company and their
 “ assignees, the said policy of insurance, No. 26., &c.;
 “ and in order that the security afforded to the said
 “ North British Insurance Company and their assign-
 “ nees by the said policy of insurance under the fore-
 “ going assignation may not be lost, we, the said James
 “ Lyon and John Barker, hereby bind and oblige our-
 “ selves conjunctly and severally, and our respective
 “ foresaids, to pay the before-mentioned premium of
 “ 73*l.* 0*s.* 5*d.* upon the said policy of insurance annually,
 “ within fourteen days of the said 4th of May, so long
 “ as the whole or any part of the said sums above
 “ contracted to be paid shall remain unpaid; and I,
 “ the said James Lyon, have herewith delivered up the
 “ said policy of insurance to the said North British
 “ Insurance Company, to be kept and used by them
 “ and their assignees as their own proper writ and
 “ evident during the nonpayment of the said sums;
 “ and we both consent to the registration hereof in
 “ the books of Council and Session, or any other com-
 “ petent record, that letters of horning, on six days
 “ charge, and all other execution necessary, may pass
 “ upon a decree to be interponed hereto,” &c.

In 1827 there was an arrear due to the appellants of

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135*l.* 10*s.* 5*d.*, being the half year's interest, and the premium of 73*l.* 0*s.* 5*d.* Mr. Lyon survived the 4th of August, (when the time for applying for a revival of the policy expired,) and died in London on the 25th of September. It was alleged by the respondent, that previous to his death Mr. Lyon had made arrangements for the renewal of the policy, and for that purpose had left with Mr. Brash, the manager for the appellants, a bill for 140*l.*, in payment of the premium. The appellants denied that any such arrangement had been entered into, and averred that the bill was left with Mr. Brash without their knowledge, and that Mr. Lyon had subsequently uplifted the money from the acceptor, and that he had spent the amount before his death.

Under these circumstances the appellants charged the respondent to pay the amount of the bond, and he brought a suspension. The Lord Ordinary made *avizandum* on cases to the Court; and the Court, before answer, ordained the appellants to give in a *condescendence*, stating the practice, as well in England as in Scotland, in transactions of that nature; and this having been complied with, the Court, on 2d July 1831, sustained the reasons of suspension, and found expenses due.*

Against this interlocutor the Insurance Company appealed.

Appellants.—The respondent, by becoming a party to the bond, incurred an effectual obligation to pay the

* 9 S. D. 869,

debt to the appellants; and as the question is, whether he has shown that an extinction has taken place of his obligation, the onus probandi rests entirely upon him.

By the bond there were provided to the appellants four different sources for obtaining repayment of the sum which they advanced to Mr. Lyon: Mr. Lyon's own personal obligation to pay that money; a similar obligation undertaken by the respondent; Mr. Lyon's claim upon Ferguson's estate, which was assigned in security to the appellants; and the policy of insurance which Mr. Lyon himself effected upon his own life, and which also was assigned in security to the appellants, with a guarantee by Lyon and the respondent that the policy would be kept up during the subsistence of the loan. But implement of the obligation has not been obtained from any of these sources; and in particular, the policy of insurance was extinct before Lyon's death, he and the respondent having, in contravention of their obligation to preserve it from being lost during the subsistence of the loan, failed to preserve it in subsistence for more than two years.*

It was no doubt alleged by the respondent, that the premium had been duly paid, but this was denied by the appellants, and thus the parties were directly at issue on a matter of fact.

Respondent.—The contract entered into between the appellants and the respondent was of a somewhat anomalous description. On the one hand, the respon-

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* *Macqueen v. Fraser*, Fac. Coll. 11th June 1811; *Erskine*, b. iii. t. 3. s. 66; *Dalrymple*, No. 167; *Bankton*, b. i. t. 10. s. 204-5; b. i. t. 23. s. 43; *Stair, Alexander v. Gordon*, 6th Dec. 1671; *Stair, Allan v. Paterson*, Dict. v. i. p. 125-6.

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dent undertook that while Mr. Lyon lived the 2,500*l.* should be payable to the appellants, and that, while this sum was outstanding, not merely the legal interest, but also the large additional annual sum of 73*l.* 0*s.* 5*d.*, should be paid to the appellants. On the other hand, the appellants, in respect of these obligations incumbent on the respondent, undertook that, in the event of Mr. Lyon's death, before the principal sum should be repaid, they should communicate to the respondent the benefit of a life insurance to the extent of 2,500*l.*, or, in other words, that they should cancel that obligation, in so far as he was concerned, for the repayment of the principal sum.

The respondent had no concern with any policy of insurance, or with any conditions expressed therein, which were not contained in the bond. The absolute and unconditional obligation under which he came to the appellants for the payment of the premium of 73*l.* 0*s.* 5*d.* yearly, in addition to the legal interest, while the principal sum remained unpaid, rendered it impossible that the counter obligation of insurance incumbent on the appellants could fall or become void as to him, and supersede, so far as the respondent was concerned, any conditions which might be inserted in the policy, or which might have been privately entered into with Mr. Lyon, whereby the insurance or the obligation of the appellants might have fallen by neglecting to pay the premium within a certain time, and therefore the claim now made is in contravention of the *bonâ fide* meaning of the agreement into which they and the respondent entered.

The respondent was merely a cautioner for Mr. Lyon, having no personal interest whatever in the advance

made to him, and became a cautioner, in reliance upon all the securities which were held out for his relief in the bond. The stipulation for the insurance, and particularly the clauses whereby the payment of the premium might have been enforced from Mr. Lyon, were intended for the benefit and security of the respondent more than of the appellants, and they were bound to have taken due steps for enforcing payment from Mr. Lyon of the premium of insurance. If they neglected to do so, they must themselves bear all the loss which has arisen in consequence of their own misconduct.*

Besides, the appellants or their secretary, by taking and retaining the bill from Mr. Lyon for 140*l.*, must be held to have received payment of the premium of insurance in question, as it is impossible to conceive for what purpose the secretary of the appellants could receive and retain this bill, unless for the payment of the interest and of the premium of insurance.

LORD WYNFORD.—My Lords, the appellants in this case are the North British Insurance Company, who had instituted proceedings on a bond which had been given to them by Mr. Lyon and Mr. Barker for the sum of 2,500*l.* It appears that they had two or three securities for the payment of this money, but that, not being satisfied with those securities, they required Mr. Lyon, for whose benefit the money was originally advanced—Mr. Barker, the respondent, being merely what we

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* Case of Want, 11th Feb. 1810, East's Rep. xii. 183; Marshall on Insurance, ii. 695; Fleming v. Thomson, 23d May 1826, ante vol. ii. p. 277; Mackenzie v. Macartney, Aug. 1831.

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should call here the surety, but in Scotland the cautioner, for the payment of the money by Mr. Lyon—the company required Mr. Lyon's life to be insured to the amount of this sum of 2,500*l.*, for which payment was to be made annually; and there was an insurance effected in consequence of this, by which 73*l.* 0*s.* 5*d.* was stipulated to be paid as the insurance for one year, and if the party lived beyond the year, there was a right, on paying within twenty-one days after the close of the year that 73*l.* 0*s.* 5*d.*, to continue the insurance for another year. If the party continued alive, and was in good health for three months, and paid $\text{£}1$ within that period, the directors were authorized to renew the insurance under the payment of a fine not exceeding 10*s.* per cent.; they might charge the party, therefore, with any fine from 1*d.* per cent. up to 10*s.* It appears that the company were putting in suit this bond; upon which the respondent, who is the cautioner, (Mr. Lyon being dead,) exhibited a proceeding called a process of suspension, the effect of which was to suspend the action on the bond, in consequence, as he said, of his being equitably discharged from the liability he was under to pay. The facts which he states, for the purpose of showing that he is discharged from the payment of that bond, arose out of this transaction of the insurance. He alleges that the insurance is in fact kept alive, and therefore, that the company being liable to the amount of this sum of 2,500*l.* insured, there is no pretence for proceeding upon the bond. The circumstances under which they insist that the insurance is kept alive are these:—They do not pretend to say that the 73*l.* 0*s.* 5*d.* was paid within the twenty-one days, nor do they say that it was paid at all within the three

months, except in the manner in which they state, but they insist that within those three months, Mr. Lyon, being anxious to prevent this gentleman who was his cautioner being rendered liable for this money, went to the office and deposited with them a note for 140*l*. Now, the circumstances under which the company state that note to have been deposited are the following:—" Mr. Lyon having deprived the chargers of " one of the securities upon which the loan had been " made to him, and having also failed to pay the " interest which fell due at Whitsunday 1827, became " alarmed lest the chargers should call up their money. " In the hope of saving himself and his cautioner from " such a demand, he, on the 24th June 1827, being a " month after the contract of insurance was at an end, " waited upon their secretary, Mr. Brash, and offered " to leave Mr. D. S. R. Dickson's acceptance, which is " mentioned by the suspender, with Mr. Brash, as an " additional security for the arrears of interest, and as " an earnest of his intention to apply for a revival of " the policy some time afterwards on his return from " London." Now, to be sure, if that is the true state of the case, there is an end of it; there is nothing like payment—it is not tendered as payment, it is tendered as an earnest that payment is at a future time to be made. They then state farther,—“ Mr. Brash refused “ to take the acceptance, or any thing but cash, even as “ a payment of the interest, but consented to allow the “ document to remain in his hands on the footing “ which has been mentioned.” What is that footing? not upon the footing of payment, but upon the footing of an earnest of payment in future. Now, the allegations in the answer to this article, it is said, are denied.

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The Court of Session have not thought fit to inquire whether they are true or false. If those allegations are true there is an end of the cause; if the tenth statement, which contains something very important, be true, as to the view of the case taken by the respondent as well as Mr. Brash, there is an end of the cause. "The suspender, as well as Mr. Lyon himself, failed to take any steps in order to obtain a renewal of the foregoing said policy within three months after its expiry. Three months afterwards the suspender, however, was in the full knowledge of Lyon having failed either to renew it within three weeks after 4th May 1827,"—that is the twenty-one days,—“or to apply for a revival of it within three months thereafter. Indeed Mr. Brash, on the 25th May 1827, the very day the policy expired, wrote a note to the suspender mentioning the circumstance. This was not an official notice (which the chargers did not require to give), but only a private communication which Mr. Brash made to the suspender in consequence of the latter having requested as a favour that the former, with whom he was personally acquainted, would inform him whether Mr. Lyon took care to pay the premium at that term. Next day the suspender called on Mr. Brash, and thanked him for the information.” To be sure, if that be true, there is an end of the case. There is no payment; and so far from that, this man, who comes to your Lordships and asks to have the proceedings upon this bond suspended, was told, “Unless you do something more, there will be an end of your claim in regard to this policy of insurance.” But it has been argued, and argued with great talent and ingenuity, by Mr. Murray, on the part of the respondent, in sup-

port of this judgment, that it was the duty of this company to keep up these payments. I have looked through these papers, and cannot find any obligation upon them to keep up these payments. There is not a word contained in any part of the policy, or any other instrument that passed between them, imposing any such obligation. If they thought proper to keep it up, they might do so—that is to say, if they found it for their interest; but I apprehend it never could be their interest to keep it up, continuing their own liability to payment in case of the death of this party. Then it is further insisted by Mr. Murray that this is affected with usury. Now I confess I cannot find the least ground for stating to your Lordships that there is any thing like usury; to constitute usury more than legal interest must find its way into the pocket of the supposed usurer. If there had been any stipulation that any accumulations on this policy should be added, (and there are accumulations in the company to which I have before adverted,) that might have been so; but it is not to add to the reward, but merely to improve the security, without which these persons never would have lent the money. I do not consider that this can in any way amount to usury. Then it is further insisted, that (this bill being left under the circumstances stated in this condescendence) it was the duty of these persons to get this bill discounted and pay themselves. I can find no such obligation as that even stated. There are two modes of getting the value of a bill,—one by selling it, and another by discounting it. If you discount a bill, you must put your own name upon it. Now, is there any thing showing that this company ever intended to put their names upon this bill, and to make themselves liable?

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There is not a scintilla of proof of that having been ever contemplated by either of these parties. If the company went into the market and sold the bill, saying, "We will not make ourselves liable upon it," I do not think they would have received enough to pay the interest. This was the only way in which Mr. Murray could put it—a very ingenious way undoubtedly, but I conceive it is not well founded. I believe the law in Scotland, in respect of bills, is this,—that unless it appears that the bill is expressly taken in payment, it is never considered a payment until it becomes actually paid. In the present case this bill, except in the manner I have stated now, would not be actual payment till seven days after the time that the payment ought to have been made. It was left in their hands, but if they used ever so much diligence, they never could have transferred the proceeds of this bill till seven days after the payment ought to have been made, and till the policy was gone. It is upon this part of the case I have great difficulty, and I wish the question should be considered by the Court below, for they have never looked at the deed of copartnership by which this company is formed. I think it is highly desirable that it should be seen whether there is any thing in the deed of copartnership giving power to the directors beyond that they ordinarily possess; if not, I am not quite sure, not only that this gentleman, Mr. Brash, had not power to take this bill, but that the directors had not, and that the moment the three weeks had expired the policy was gone—that it was void. You cannot improve a thing which is void; you may set up a thing that is voidable, but you cannot deal with a thing that is void; you must make a new policy. You cannot ask the

directors to go beyond the authority conferred upon them; and if they do, their act is void. The directors are the servants of the company; and those directors could not, the policy being void, make a new agreement of a year. If they could do that one year, they might do it ten years after the policy had expired, when the insurance would be unquestionably not at the same rate of premium; but if you look to the table of premiums, you will see the rate of premium in this, as with every other office, increases year by year. If you are insured at thirty years of age at three per cent., you are insured at the age of thirty-one at three and a quarter per cent. This, therefore, would be reviving a policy completely at an end, and not on the terms on which alone the directors are authorized to treat the persons who apply to have their lives insured. This would be a revival upon the same terms as if Mr. Lyon, the person whose life was to be insured, had not moved on, but that the sun had stood still, and he was not a minute older. I doubt extremely whether the directors themselves had authority to make such a bargain; the directors have only such authority as the society at large have given them. It appears to me that the Court ought to have before them the deed, and to see the authority conferred upon them; and whatever belongs to the directors, unquestionably Mr. Brash had no such authority, and under no circumstances could it be done unless it was done by the directors. I doubt extremely whether even the directors had such power; but it may not, however, be necessary to settle that question; for whether the power belongs to the directors or not, unless that authority has been given to Mr. Brash, all which has taken place with respect to this bill is of no validity.

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My Lords, it appears to me there is another question which has not been much considered. If Mr. Brash had done any thing which he had not authority to do, he might be personally responsible, but they might lose his benefit of the bill; but the renewing the benefit of the policy is quite another question, which appears to me not to have been considered. Under all the circumstances of the case, I should submit to your Lordships that this case is scarcely ripe for final decision, and that it will be more satisfactory it should go down again. It had occurred to me at one time that it would be fit it should be sent down, with a direction that it should be sent to a jury, to ascertain first whether Mr. Brash had any such authority as it is supposed he acted under in this case; but perhaps it would be better to leave that to the Court, whether they will send it to a jury, or examine into it themselves by examining Mr. Brash. They will be best able to determine what is the most satisfactory mode. I should therefore submit to your Lordships that it will be proper this interlocutor should be reversed, and that this case should be sent down to the Court of Session with directions, which directions I will take care shall be put upon your Lordships minutes before it is remitted, to examine Mr. Brash according to the practice which prevails in Scotland—to examine into his authority to do that which it is denied that he ever did; to ascertain, first, whether he ever did it; and next, whether, if he did, he had any authority to do it. Perhaps it may not be necessary to go farther than that; but if it is, I am of opinion that they ought to look into the deed to see whether that would be done in such a case as this, without calling together the members of the company and obtaining their consent. I

have had my own life insured for thirty years in a company in this country, from which, I think, the North British Insurance Company borrowed their form of deed. I have not often attended, my time having been so much occupied; but I have been repeatedly summoned to attend meetings, in which it has been submitted to the company at large, whether the directors should be enabled to renew the engagement with a party who had slipped the time, at the annual payment at which he was before insured. If Mr. Brash did that which it is stated on the part of the respondent he did; then it will be necessary to inquire into his authority. It may, in some view of the case, be necessary to go further,—to look into the deed, and to see whether any thing could be done without the consent of the company. The Judges of the Court appear to have been led away by the idea that the insurance company ought not to be lenders of money; but I should beg to ask in what way this insurance company are to use their money if they do not lend it? It is, in my opinion, a practice perfectly consistent with the usage of these companies. It is as common for insurance companies as for individuals, where a man has the least interest, to require that his life should be insured, and that the rate of premium charged to the borrower of the money be precisely that rate of premium they would charge to the person to whom they lent their money; and I, for one, cannot see the least objection to an insurance company lending money, and insuring in their own office the life of the person to whom the money is so lent. If that is a contrivance that, under cover of that payment, they may be enabled to get more than five per cent., unquestionably that will be usurious;

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but usury is a crime ; it is not to be inferred ; it must be alleged in the pleadings, and it must be proved. I cannot see how there would be any pretence for supposing any thing unfair or improper, unless the borrower of the money was charged a higher rate for the policy of insurance in consequence of their being the lenders of the money. With these observations I would move your Lordships, that the judgment of the Court of Session be reversed, and the case sent again to the Court of Session, with directions to the effect which I have stated.

The House of Lords ordered and adjudged, That the several interlocutors complained of in the said appeal be and the same are hereby reversed : And it is further ordered, That the cause be remitted back to the Court of Session, to consider whether it is consistent with the law and practice of Scotland to examine John Brash in this cause, and if they find that it is so consistent, then to ascertain, by the examination of the said John Brash, and from such other legal evidence (if any) as they may find applicable to the case, for what purpose the bill for 140*l*. in the pleadings mentioned was received by him, and particularly whether the said bill was received as payment of the premium which fell due on the 4th day of May 1827, for the continuance of an insurance for 2,500*l*. on the life of James Lyon, for one year from and subsequent to the said 4th day of May 1827, and which bill, being dated the 21st day of June 1827, and payable fifty days after date, fell due at a period subsequent to the expiry of three months from the time at which the said premium was payable ; and in case the said Court shall find that such bill was received by the said John Brash as payment of the said premium, then the said Court shall consider and find whether the said John Brash had any and what authority so to receive such bill, and upon what instrument or evidence such authority (if any) is founded ; and in case the said Court

shall find that the said John Brash had authority from the directors of the said company so to receive such bill, then the said Court shall consider whether under the contracts or agreements and charter constituting the said company the directors had any authority to receive or to authorize the receipt of such bill as payment of the said premium ; and in case the said Court shall find that the said John Brash cannot, according to the law and practice of Scotland, be examined in this cause, or shall find either that the said John Brash did not in fact receive the said bill as payment of such premium as aforesaid, or that the said directors had no authority to receive or authorize such receipt, or that the said John Brash was not duly authorized to receive the said bill as such payment, then and in any of such cases it is further ordered, That the said Court shall find the letters orderly proceeded, and do further in the cause as shall seem just and consistent with this judgment.

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MONCREIFF, WEBSTER, & THOMSON—J. BUTT,
Solicitors.

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No. 23. ARCHIBALD GIBSON (Wilson and Sons, Trustee),
Appellant.—*Dr. Lushington—Murray.*

JOHN KIRKLAND and J. F. SHARPE, Respondents.—
Solicitor General (Campbell).

Bankruptcy—Trust.—A party who held a lease and feus became bankrupt, and the trustee on his sequestrated estate entered into possession of the lease, and was infeft in the feus; and for several years took the benefit of the lease and feu-rights for the use of the sequestrated estate—Held (affirming the decision of the Court of Session) that he was bound to fulfil the prestations due under these contracts towards the landlord.

2D DIVISION.
Lord Medwyn **W**ILSON and Sons, carrying on business as iron masters at Wilsontown, held a lease, for forty years, of coal in the lands of Climpy, and two feus of the same property from the proprietor, Mr. Crawford. The rent payable under the lease was 150*l.* for the first five years, and 200*l.* for the remaining years; and the total amount of the feu-duties was 115*l.* a year. Owing to the embarrassment of their affairs in 1808, Wilson and Sons executed a trust, and in 1812 a sequestration was awarded against them. Under the latter Mr. James Bristow Fraser was appointed trustee, and entered into possession of the coal lease as well as of the two feus,

in which he was afterwards infeft, and he carried on the iron works for a short time after his appointment, during which period the coal was wrought for the use of the works.*

Repeated attempts were made to effect a sale of the works, coal lease, and feus by advertisement, but without success. In the meantime the estate of Mr. Crawford having been sequestrated, and a trustee appointed, his trustee instituted three actions against Fraser as trustee on the estate of Wilson and Sons; first, an action libelling on the lease, and setting forth that the coal works had been stopped and the machinery dismantled, and praying that the machinery should be restored; second, an action concluding for payment of the feu-duties bypast, and half-yearly for all time coming; third, an action of irritancy and removal ob non solutum canonem. Fraser in defence did not deny his liability, but stated counter claims against the conclusion for rents and feu-duties. In 1814 these processes and the mutual claims of the parties were submitted to the decision of Mr. Henry Cockburn, advocate, as arbitrator. The submission was, first, of all demands, claims, disputes, questions, and differences depending or subsisting between the parties as trustees; second, of a specific claim made by Crawford's trustee, and all other claims competent to him in virtue of the lease of the coal, and feu contracts; third, of the actions before mentioned; and, fourth, of a claim by Wilson and Sons on Crawford's estate. Pending the discussion of these claims sums were paid to and received on account

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* See the facts more fully detailed in the Lord Ordinary's interlocutor, p. 342, et seq.

No.23. of sales of coals, and as rents of the pasture grass on
 25th March the feus, on behalf of the sequestrated estate. A decree
 1833. arbitral was pronounced in July 1817 by Mr. Cockburn,
 GIBSON by which he sustained inter alia the landlord's claim to
 v. the coal rents and feu-duties to Whitsunday 1817,
 KIRKLAND assoilzied Fraser from the declarator of irritancy, and
 and found, "that upon implement of the foresaid findings,
 SHARPE. "the said parties, submitters respectively, are hereby
 "severally and mutually discharged of all claims which
 "they may have against each other under this sub-
 "mission, or the processes referred to in it, together
 "with the said processes themselves, and all following
 "or competent to follow thereon."

In 1818 the respondents, Kirkland and Sharpe, purchased the lands of Climpy, and also the feu duties from the trustee on Mr. Crawford's estate; and in September of the same year the Wilsontown property, including the lease, but not the feu-rights, was exposed to public roup, and also in the following year till June 1820, when the lease was omitted from the articles of roup. The respondents, alleging that Fraser, as trustee, had continued in possession of the lease and feu-rights, raised an action before the Court of Session, concluding that it should be found that the trustee had become lessee and vassal; and for payment of the arrears of rent and feu-duty, and that he was liable in future for such payments. These claims were resisted by Fraser on the ground that the estate was not liable, and that at all events, the decree arbitral having been implemented, nothing more could be demanded. Fraser having become bankrupt, the appellant, Gibson, was appointed trustee in his stead. The record being closed, the Lord Ordinary pronounced the following interlocutor:—"Finds,

“ that after trying the effect of a voluntary trust, the
 “ estates of Messrs. Wilson and Sons, late iron masters
 “ at Wilsontown, were sequestrated in June 1812, and
 “ Mr. James Bristow Fraser, the trustee, entered into pos-
 “ session of a coal lease of part of the lands of Climpy,
 “ as well as of two feu-rights of parts of the said pro-
 “ perty, and was infeft therein 25th of July 1814:
 “ Finds it admitted that the said trustee carried on the
 “ Wilsontown iron works from the term of his appoint-
 “ ment at least till December 1812, and that during
 “ this period the coals in the lands of Climpy were, in
 “ virtue of the said lease, worked for the use of the
 “ works: Finds it further admitted, that in February
 “ 1813 sums were paid to and received from Thomson
 “ the overseer on account of sales of coals at Climpy
 “ on behalf of the trust estate: Finds it further ad-
 “ mitted, that for several years subsequent to the se-
 “ questration the pasture grass on the Climpy feus
 “ was let on behalf of said estate, and in particular
 “ that payments from this source were received down
 “ to Whitsunday 1819: Finds that Mr. Crawford, the
 “ proprietor of Climpy, having also been sequestrated,
 “ his trustee in 1812 instituted three actions against
 “ the trustee on Messrs. Wilson’s estates, one in the
 “ Sheriff Court relative to the lease, and the other two
 “ in this Court relative to the feus, one of them for
 “ payment of the feu-duties, and the other a declarator
 “ of irritancy ob non solutum canonem; and that the
 “ Wilsontown trustee did not state in defence that he
 “ had not entered into possession, or that he meant to
 “ surrender the possession to the landlord, nor did he
 “ allege that he had intimated to the landlord, and
 “ obtained his approbation or acquiescence, that he

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“ was trying the experiment of a sale, and did not
“ mean to take possession of them for behoof of the
“ estate; on the contrary, it appears that at this time
“ these subjects were reckoned valuable appendages of
“ the iron works, and that he only stated counter claims
“ against the rents and feu-duties claimed from him as
“ assignee to the lease and feus in the lands: Finds,
“ that in August 1814 these processes and the mutual
“ claims of the parties were submitted to the decision
“ of Mr. Henry Cockburn, advocate, and that a decree
“ arbitral was pronounced in July 1817, which sus-
“ tained various claims of the parties hinc inde, and
“ among others the claim on the part of the landlord
“ to the coal rents under the lease, and the land rents
“ under the feu-rights down to Whitsunday 1817:
“ Finds, that as the trustee did not argue in this sub-
“ mission that he had abandoned the lease and sur-
“ rendered the feu rights, and that he was no longer
“ liable for them, but, on the contrary, if not expressly,
“ he at least tacitly admitted himself to be liable to
“ implement the conditions of the lease and the feu-
“ rights, the clause in the decree arbitral founded on,
“ which mutually discharges all claims the one party
“ has against the other, cannot be interpreted as cut-
“ ting off the landlord’s claim to these rents and feu-
“ duties subsequent to Whitsunday 1817: Finds it
“ averred by the pursuers that, subsequent to the date
“ of the decree arbitral, it was held by both parties
“ that the lease and feu-rights continued in force as
“ before, and possessed by the Wilsontown trustee—a
“ statement which is simply denied by the defender;
“ but this denial is contradicted by his continuing to
“ draw rent for the pasture grass; moreover, he does

“ not allege that after the date of the decree arbitral
 “ there was any notice of the surrender or these to the
 “ landlord, and invitation to him to take possession,
 “ and that the defender was no longer to be liable for
 “ the rent and feu-duty ; on the contrary, the Wilson-
 “ town trustee was assoilzied by the decree arbitral
 “ from the declarator of irritancy. He is craved for the
 “ rent due at Whitsunday 1818, to which he returns
 “ no answer ; and though the feu-rights were not, the
 “ lease was expressly exposed to public roup along
 “ with the other Wilsontown property of the following
 “ dates, 16th of September 1818, 20th of January,
 “ 10th of February, and 10th of March 1819, forming
 “ lot second of the subjects exposed, as alleged by the
 “ pursuers, at the upset price of 2,000*l.*, which is
 “ denied by the defender, who, however, does not state
 “ what was the upset price of this lot ; and no offerer
 “ having appeared, the property was again exposed to
 “ sale on the 14th of June 1820, when, for the first
 “ time, the said lease was left out of the articles of
 “ roup : Finds that the pursuers, who had purchased
 “ the lands of Climpy in 1818, having renewed the
 “ demand for the coal rents due under the lease, and
 “ the feu-duties under the feu-rights, the Wilsontown
 “ trustee was instructed by the creditors to resist this
 “ claim by the resolution of the 27th of December 1820,
 “ on the ground that the decree arbitral having been
 “ implemented, nothing more was due : Finds, under
 “ these circumstances, that the Wilsontown trustee
 “ having entered into possession of the lease, and been
 “ infeft in the feu-rights, and having for so many years
 “ taken benefit of the lease and feu-rights for the use
 “ of the sequestrated estate, has become the assignee

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“ to the lease, and the vassal in the feu-rights, and must
 “ be bound to fulfil the prestations due under these
 “ contracts towards the landlord, and is not now en-
 “ titled to abandon them: Finds that Mr. Fraser, the
 “ trustee, has been succeeded in his office by the
 “ present defender, and no decree is now craved, either
 “ as an individual or as trustee, against Mr. Fraser:
 “ Therefore, and in respect that the pursuers have ac-
 “ quired right to the coal rents and feu-duties which
 “ fell due subsequent to Whitsunday 1817, decerns
 “ against the defender, the trustee on the Wilsontown
 “ estate, for the rents and feu-duties subsequent to
 “ Whitsunday 1817, payable half-yearly at the terms
 “ of Martinmas and Whitsunday, with interest from
 “ the term at which each fell due and till payment, and
 “ to continue the payment of the said rent and feu-
 “ duties, with interest as above, during the subsistence
 “ of the said contracts respectively: And, further,
 “ finds the defender liable in expenses, of which
 “ allows an account to be given in, and remits to
 “ the auditor to tax the same when given in, and to
 “ report.”

To this interlocutor the Court adhered on the 17th
 May 1831.*

Gibson appealed.

Appellant.—The trustee upon a sequestrated estate
 does not become a lessee, although, while acting within
 the statute, he enters into possession for the purposes of
 management and consequent sale and realization; nei-

* 9 S. D. 596.

ther can a trustee under such circumstances become a feudal vassal, because his assumption of such a character would be directly at variance with the nature of his trust, and subversive of the provisions and spirit of the sequestration statute. Where a trustee acts within the statute, he is not only entitled but bound to take possession for the purposes of sale and realization; and it is incumbent on the respondents to prove that he travelled out of the statute, and became lessee and vassal; but this has not been proved by the respondents. As long as a trustee possesses and otherwise manages for the purposes of sale and realization, conformably to the directions of the creditors, and assisted by the commissioners, he is within the statute, and his acts will bind the estate and the body of the creditors; but if he enter into speculations, or act against or without the directions of the creditors, he binds only himself personally and those creditors by whom his proceedings shall have been authorized and sanctioned; and the estate and the body of creditors are free.* Besides, by the terms of the submission and decree arbitral all claims against the trustee under the lease and feu contracts were discharged; or, at least, those deeds, when taken into consideration with the subsequent conduct of the trustee, are equipollent to a declaration of non-adoption.

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Respondents.—The grounds on which the judgments

* Campbell v. Common Agent on estate of Edderline, Jan. 14, 1801, Mor. voce Adjudication, Appendix, Part I, No. 11; Bell's Election Law, p. 121-8; Murray v. Neilson, March 5, 1735, Mor. 8804; Donaldson and others v. Grant, March 11, 1786, Mor. Dic. 8689; Campbell v. Spiers, Dec. 14, 1790; Bell's Election Law, note, p. 123-26; Lockhart v. Wingate, Feb. 19, 1819, Fac. Col. 652.

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in this case must be affirmed are clearly recapitulated in the interlocutor of the Lord Ordinary. The uncontroverted facts show that the trustee on the estate of the Wilsontown company did become liable as assignee of the coal lease and feu-contracts, and deliberately acted for years with a view to what he considered the interest of the creditors whom he represented, as the assignee and successor of the Wilsontown company, the original tenants and feuars. It is a proposition incontestable on general principles, that when an assignee takes up a right vested in the assigner, he becomes liable to all his responsibilities; if he take an estate he takes it with its burdens, on the maxim "cujus commodum est ejus debet esse incommodum."*

LORD WYNFORD.—My Lords, the only difficulty that has occurred to me in this case has arisen from the difficulty of finding out what the facts are in the midst of this mass of papers; when once the point is got at, it appears to me that there is nothing to discuss. If I felt there was the least difficulty, I should not propose to your Lordships to give judgment in the absence of my noble and learned friend, who has been obliged, on account of public business, to withdraw himself. I knew what my noble and learned friend's opinion was before he left the woolsack, and nothing has since occurred to alter that opinion. This is a proceeding called an

* Nisbet's Trustees, Fac. Coll. Dec. 10, 1802, Morr. 15,258; Cuttall v. Jeffrey, Nov. 21, 1818, Fac. Coll.; Broome v. Robinson, 7 East, p. 339; Turner v. Richardson, 7 East, p. 334; Wheeler v. Bramah, 3 Campbell's Reports, p. 340; Hanson v. Stevenson, 1 Barn. & Ald. p. 303; Welsh v. Myers, 4 Campbell, p. 368; Hastings v. Wilson, 1 Holt, N.P., 290; and Thomas v. Pemberton, 7 Taunton, p. 206.

action of declarator. We have no such proceeding in the law of England. It is one by which a party desires to have a right affirmed to him, and the complainant in this case desires to have this right affirmed to him. After stating several circumstances he says, "Affirm my right to recover against this defendant the rents of this estate." The question is, is he entitled to them? The lease was granted, not to the present defender, but to a person whom the present defender represents as his assignee. The original lessee having become bankrupt, his property was sequestrated, and the party who appears before your Lordships is the person who stood in the situation of assignee under that sequestration. The original lessor had also become bankrupt, and his property was assigned to another person. It seems there were considerable debts existing, and there was a debt due from the original landlord to the original tenant to the amount of about 1,900*l*. In consequence of disputes that had occurred the question between these parties was referred to a gentleman, who was appointed the arbitrator to decide between them, and he decided that the amount which should be found due should be set off against the feu-dues and rents of the estate which would become due up to the year 1814. The arbitrator decided, that from the year 1814, this person, who was a bankrupt,—the defender,—is no longer entitled to the use of the debt to be set off against the said dues, but that he is to come in as an ordinary creditor. The person remains still in possession of the property; and it seems to me to be admitted in the course of the argument, that if there had not been an assignment of the counterpart of the lease, it could not be contended that he had not remained long enough to

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have made what is called an election to the property,—to have held it for the remainder of the term; because your Lordships will perceive that in 1814 he might have got out, or as soon after as he found it would not be beneficial to the persons whom he represented for him longer to retain the property,—instead of which, he remains in possession till 1820. Then he states that he shall not remain in possession, as a tenant must remain in possession, in consequence of the assignment of the counterpart of the lease. It is admitted, however, by those who insist that he remained in possession under the assignment, that the assignment, as far as it gives the assignee a right to recover the rents, is good against a singular successor—that is, against a person standing in the situation of those who claim the establishment of this right, calling on the person to pay his rents over to him. It struck me as extraordinary that the assignment should be said to extend to preventing the assignee recovering the rents, yet that it was to be considered that the man was in possession under the assignment, and not under his own lease. I think he must be considered as being in possession under his original lease; but the argument was very ingeniously put by Mr. Murray, at your Lordships bar, as to this assignment never having been assigned. This lease has never been assigned. They admit the property and the estate have been assigned, but the lease has never been assigned. But the terms of the lease, which was read to your Lordships, are, that the lessee binds himself, his executors, administrators, and assigns. The moment the estate is assigned the property and the lease are assigned, and all other things are assigned,—therefore it seems to me there is no pretence for that argument. This

point does not seem to have been argued in the Court below. It was reserved to be argued here before your Lordships, who are not so familiar (and I include myself) with Scotch proceedings as they are in the Court below. In the Court below, as far as I can collect from the interlocutor, the question was, whether this person remained in possession a sufficient length of time to render him liable on the lease? There was nothing said as to the effect of the argument. Now, for the first time, it is argued that it was the assignment under which he was in possession, and not the lease. I cannot but consider that he was in possession under the original lease, and I think that he was in possession too long if he remained in possession after 1814, for though, undoubtedly, this was not decided until 1817, yet it was decided in 1817 that he was not to set off the rents after 1814; but perhaps it is not necessary to trouble your Lordships with observations on this part of the case, for he did not quit until 1817, and he continued in after 1817, and received a part of the profits of the estate in 1818, in 1819, and in 1820. I have always understood the law to be this, and it must be the law—for common sense constitutes the foundation of the law on both sides of the Tweed,—that if a man chooses to take part of the benefit of an estate, he must take it subject to all incumbrances. A man cannot say, I will receive the rents of part of an estate, and not be considered in possession of the whole. In this part of the United Kingdom, if a man remains in possession longer than is necessary to ascertain what is the value of the property, that is, as the assignee of a bankrupt, he renders himself liable to the covenants of the lease. In this case it is impossible to contend that he remained in possession to ascertain its value. It has

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been said by Dr. Lushington, that he remained in possession of the coal works to enable him to carry on a manufactory. No bankrupt's assignee has a right to remain in possession of an estate, for the purpose, not of ascertaining what is the value of the estate, but of carrying on some other manufactory. That is a plan by which he may be very much benefited, and by which the owner of the estate certainly may be very much prejudiced. My Lords, the learned Judges in the Court below had no difficulty in deciding that which was submitted to them. It appears from the report that the only question raised there was, whether this was decided on by the arbitrator in the Court below, so as to prevent them from getting at the question. The learned Judge who gave judgment below (for there was only one of the Judges who seems to have said any thing in giving the judgment) said, "After paying every possible attention to the case, I can find nothing in the decreet arbitral which can possibly be said to extinguish these contracts of lease and feu in all time coming." It therefore seems to me, that unless there was something in the award which prevents the judgment from being given, that is the judgment which ought to be given. The Court below found nothing in the award which prevented the Court coming to the conclusion to which I humbly recommend your Lordships to come. I confess I do not see the least ground, from any thing which appears in any part of this award, to interfere with the judgment which has been pronounced in this case, and I shall humbly advise your Lordships to affirm the judgment of the Court below, and I am disposed to think it ought to be with costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors therein complained of be and the same are hereby affirmed : And it is further ordered, That the appellant do pay or cause to be paid to the said respondents the sum of 100*l.* for their costs in respect of the said appeal.

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A. DOBIE—MONCRIEFF, WEBSTER, and THOMSON,
Solicitors.

[22d April 1833.]

No. 24. WILLIAM ALEXANDER BRYDEN and others, Appellants.—*Lord Advocate (Jeffrey)*—*Stuart*.

JESSIE BRYDEN or SAUNDERS and others, Respondents.—*Dr. Lushington*—*Murray*.

Clause—Testament.—Circumstances in which an obscurely worded deed of settlement was interpreted (affirming the judgment of the Court below) to mean, 1. That the division of the property was bipartite, or per stirpes, amongst the families of two nephews; and, 2. That trustees were bound to denude in favour of the minor children of the elder nephew when the eldest child of the younger nephew had attained twenty-one years of age.

Expenses.—Both parties found entitled to their expenses out of the property bequeathed.

1st Division.

Lord Corehouse.

JAMES BROWN of Westwood, who died in 1815 without issue, executed a deed of settlement in 1813, at which time he had two nephews, John and Adam Bryden. John, the elder, who was heir-at-law to his uncle, married Esther Craig in 1809, but had no issue at the time the settlement was made, or at the death of Mr. Brown. Adam, the younger nephew, had died previous to the making of the settlement, leaving two daughters. The deed was as follows:—"I, James "Brown of Westwood, heritable proprietor of the

“ lands and others after mentioned, for the love, favour,
 “ and affection I have and bear to Mary Johnston my
 “ spouse, and the other persons after named and de-
 “ signed, and for other good causes and considerations
 “ me hereto moving, have given, granted, and disposed,
 “ as I do hereby give, grant, and dispoise, from me,
 “ my heirs and successors, to and in favour of the said
 “ Mary Johnston my spouse, in life-rent, during all the
 “ days of her lifetime, in the event of her surviving me,
 “ all and whole my lands of Westwood, with the whole
 “ houses, biggings, yards, woods, mosses, parts, and
 “ pertinents thereto belonging, as presently possessed
 “ by myself, all lying within the parish of Tundergarth
 “ and county of Dumfries; and likewise have given,
 “ granted, and disposed, as I do hereby, with and
 “ under the conditions, provisions, burdens, restrictions,
 “ declarations, and reservations after specified, give,
 “ grant, and dispoise, from me, my heirs and successors,
 “ to and in favour of William Grierson, only son pro-
 “ create of the marriage between William Grierson in
 “ Bucklerhole and Jean Johnston, daughter of William
 “ Johnston of Bengall, James Broatch, eldest son pro-
 “ created of the marriage between John Broatch in
 “ Boraxfield and Agnes Johnston, also daughter of the
 “ said William Johnston, and William Walker, son of
 “ Alexander Walker in Fourmerkland, and to the sur-
 “ vivor or survivors of them, equally amongst them,
 “ not only the foresaid lands of Westwood and perti-
 “ nents thereof, after the decease of the said Mary
 “ Johnston my spouse, in the event of her surviving
 “ me, but also all and whole my land of Scalehill
 “ and Herds Bogside, together with the whole houses,
 “ biggings, yards, mosses, muirs, and pertinents thereto

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“ belonging, all lying within the parish and county
“ aforesaid, to be by them or survivor of them occu-
“ pied and possessed aye and until the eldest surviving
“ child or children to be hereafter lawfully procreated
“ of the body of John Bryden, merchant in Lockerbie,
“ during his present marriage with Esther Craig, or
“ any future marriage, and the eldest lawful child or
“ children of Adam Bryden, some time in Smallholm
“ Burn, deceased, my nephews, or either of them, shall
“ arrive at the age of twenty-one years complete, at
“ which period the said William Grierson, James
“ Broatch, and William Walker, and the survivor or
“ survivors of them, then in the possession of the said
“ lands, are hereby expressly bound and obliged, as
“ they and each of them by acceptance hereof be-
“ come bound and obliged, to redispone and denude
“ themselves thereof in favours of the child or chil-
“ dren of the foresaid John and Adam Brydens before
“ described; and upon that child or these children
“ attaining the age of twenty-one years complete as
“ aforesaid, I hereby revoke, recall, and annul the
“ foresaid disposition in favour of the said William
“ Grierson, James Broatch, and William Walker to all
“ intents and purposes, the same as if it had never been
“ made and granted, together with all that has followed
“ thereon in their name and favour; and I hereby
“ give, grant, and dispone to and in favour of the
“ children lawfully procreated of the body of the said
“ deceased Adam Bryden, and the children to be here-
“ after lawfully procreated of the body of the said John
“ Bryden, during his present or any future marriage,
“ equally amongst them, share and share alike, the
“ heirs male of each of their bodies always excluding

“ the female, and in the event of there being no male
 “ child or children in either or each of their families,
 “ then and in that case the daughters shall succeed as
 “ heirs-portioners, and the heirs and disponees of the
 “ said persons who shall succeed in virtue hereof,
 “ whether male or female, heritably and irredeemably,
 “ all and whole the foresaid lands of Westwood, after
 “ the decease of the said Mary Johnston, in the event of
 “ her surviving me, as also all and whole the fore-
 “ said lands of Scalehill and Herds Bogside, with the
 “ whole houses, biggings, yards, parts, pendicles, and
 “ universal pertinents of the said respective lands,
 “ lying and described as aforesaid, together with all
 “ right, title, and interest whatsoever which I, my
 “ predecessors or authors, had, have, or may anyways
 “ claim or pretend to the lands and others above dis-
 “ poned, or any part thereof, but always with and
 “ under the conditions, provisions, burdens, restrictions,
 “ declarations, and reservations before and after spe-
 “ cified; declaring always, as it is hereby expressly
 “ provided and declared, that the children brought
 “ forth by Janet Irving, daughter of John Irving in Sark-
 “ shields, in consequence of any pretended marriage
 “ or connexion between her and the said John Bryden,
 “ nor none of these children’s heirs, shall have right,
 “ title, or interest, in law or in equity, to succeed me
 “ in any part of my estates, real or personal, as pretending
 “ to represent the said John Bryden or otherways, and
 “ I hereby expressly exclude and debar them from any
 “ succession accordingly. It is likewise hereby expressly
 “ provided and declared, that the said William Grier-
 “ son, James Broatch, and William Walker, or the sur-
 “ vivor or survivors of them, upon the event of the

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“ lawful child or children before described of the before-
 “ designed John Bryden and Adam Bryden, deceased,
 “ attaining the years of majority, and entering into the
 “ possession of the lands and others before disposed,
 “ shall not be bound to account for any of the rents of
 “ these lands received by them during their possession,
 “ nor shall any action lie or be competent to the heirs
 “ of the said John and Adam Bryden against them for the
 “ same; in which lands and others above disposed, with
 “ the pertinents, and with and under the conditions, pro-
 “ visions, burdens, restrictions, declarations, and reserva-
 “ tions before and after specified, I bind and oblige me,
 “ my heirs and successors whomsoever, to infest and
 “ seise the said Mary Johnston in life-rent, for her life-
 “ rent use allenary, and the said William Grierson,
 “ James Broatch, and William Walker, and survivor
 “ or survivors of them, and the heirs of the said John
 “ and Adam Bryden, described in the dispositive clauses
 “ of these presents, and their foresaids in fee, and that
 “ by two several infestments and manners of holding,—
 “ the one thereof to be holden of me and my foresaids
 “ in free blench for payment of a penny Scots money,
 “ upon any part of the ground of the foresaid lands, at
 “ the term of Whitsunday yearly, if asked only, and
 “ the other of the said infestments to be holden from us,
 “ of and under our immediate lawful superiors thereof,
 “ as freely as I hold the same myself, and that either
 “ by resignation or confirmation or both, the one with-
 “ out prejudice of the other; and for completing the
 “ said infestment by resignation I hereby constitute
 “ and appoint and each of
 “ them, jointly and severally, my lawful and irrevocable
 “ procurators, giving, granting, and committing full

“ power and warrant for me and in my name to resign
 “ and surrender, as I hereby resign, surrender, and
 “ overgive, all and whole the foresaid lands of West-
 “ wood, Scalehill, and Herds Bogside, as described in
 “ the dispositive clause of these presents, and herein
 “ held as repeated, brevitatis causâ, in the hands of my
 “ immediate lawful superiors of the same; or of their
 “ commissioners in their name, having power to receive
 “ resignations, and thereupon to grant new infestments
 “ in favour, and for new infestments of the same to
 “ be given and granted to the said Mary Johnston in
 “ life-rent, and to the said William Grierson, James
 “ Broatch, and William Walker, and survivor or sur-
 “ vivors of them, and to the heirs of the said John
 “ and Adam Bryden, before described in the dis-
 “ positive clause of these presents and their fore-
 “ saids, in fee, heritably and irredeemably, acts,
 “ instruments, and documents upon the premises to
 “ ask and take, and generally every other thing there-
 “ anent to do which I could have done myself if
 “ present, or which to the office of procuratory in
 “ such cases is known to belong, promittens de rata,
 “ but always with and under the conditions, pro-
 “ visions, burdens, restrictions, declarations, and reser-
 “ vations before and after specified, and which are
 “ appointed to be engrossed in the infestments and
 “ charters to follow hereon. Moreover, I hereby as-
 “ sign and convey to and in favour of the said Mary
 “ Johnston my spouse in life-rent, and for her life-rent
 “ use allenarly, during all the days of her lifetime, in
 “ the event of her surviving me, not only the whole
 “ rights, titles, and evidents of the said lands of West-
 “ wood, with all that has or may be competent to follow

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“ thereon, but also the rents, maills, and duties of the
 “ said lands, from and after my decease; as also I
 “ hereby give, grant, assign, and dispoise to and in
 “ favour of the said Mary Johnston in life-rent, in case
 “ she survive me, all and whole my stock and crop
 “ that may be at my decease upon the lands of West-
 “ wood then in my possession, also my household furni-
 “ ture, blankets, bed, and table linen, and silver plate,
 “ during her life, with power to her to dispose of the
 “ one half thereof as she may think proper, but the
 “ other half thereof, after the decease of the said Mary
 “ Johnston, I hereby give, grant, assign, and dispoise
 “ to and in favour of Agnes Bryden, my niece, and her
 “ children, if any, equally between them; and further,
 “ I hereby assign and convey to and in favour of the
 “ said William Grierson, James Broatch, and William
 “ Walker, and to the survivor or survivors of them,
 “ and to the heirs of the foresaid John and Adam
 “ Bryden before described, and their foresaids, not only
 “ the rights, titles, and evidents of and concerning the
 “ said lands of Westwood, and rents, maills, and duties
 “ of the same, from and after the death of the said
 “ Mary Johnston, and the rights, titles, and evidents
 “ of the said lands of Scalehill and Herds Bogside,
 “ with all action and execution competent to me
 “ thereupon, but also the rents, maills, and duties
 “ of the said lands, from and after my decease, with
 “ full power to uplift and discharge them, but always
 “ with and under this restriction and declaration,
 “ as it is hereby expressly conditioned and declared,
 “ that it shall not be in the power of the said Wil-
 “ liam Grierson, James Broatch, and William Walker,
 “ and survivor or survivors of them, to sell, alienate,

“ wadset, impignorate, or dispone the foresaid respec-
 “ tive lands or any part thereof, either irredeemably
 “ or under reversion, or to burden or affect the same
 “ in whole or in part with debts or sums of money,
 “ infestments of annual rent, or any other burden or
 “ servitude whatever, or to grant any leases of the
 “ said lands to a tenant or tenants of a longer endur-
 “ ance than three years, and that at the highest yearly
 “ rent that can be obtained therefor at the time; and
 “ also declaring, as it is hereby expressly provided and
 “ declared, that upon the said William Grierson, James
 “ Broatch, and William Walker, and survivor or sur-
 “ vivors of them, and the heirs male or female before
 “ described of the said John and Adam Bryden, suc-
 “ ceeding to me in virtue hereof, conform to the dis-
 “ positive clause of these presents, shall be bound and
 “ obliged, as they by acceptation hereof become bound
 “ and obliged, to pay to the said John Bryden a
 “ yearly annuity of 20*l.* sterling, beginning the first
 “ term’s payment thereof at the first term of Whit-
 “ sunday or Martinmas which shall first happen after my
 “ decease for the year immediately preceding, and so
 “ on yearly thereafter during his natural life, with a fifth
 “ part more than each term’s annuity of liquidate
 “ penalty in case of failure; and also to pay my sick-
 “ bed and funeral expenses, and all my just and lawful
 “ debts, and the following legacies, which I hereby
 “ leave and bequeath to the persons after named and
 “ designed, videlicet,” &c.

Then follows an enumeration of particular legacies,
after which this clause:—

“ And in order to enable the said William Grierson,
 “ James Broatch, and William Walker, in case they

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“ shall enter to the possession of the foresaid lands in-
 “ virtue hereof, to discharge the foresaid debts and
 “ legacies, I hereby give, grant, assign, and dispone to
 “ and in favour of them or either of them, whom fail-
 “ ing, to the heirs of the aforesaid John and Adam
 “ Bryden, male or female, as before described, all and
 “ sundry debts and sums of money constituted by per-
 “ sonal bonds or bills, decreets, accounts, or otherwise,
 “ arrears of rent, farming utensils, goods, gear, and
 “ effects of every kind and denomination, which shall
 “ belong or be owing to me at the time of my death,
 “ wherever the same may be situated, together with
 “ the whole instructions of the said debts, excepting
 “ and reserving always therefrom, as it is hereby spe-
 “ cially excepted and reserved, the whole stock and
 “ crop, growing or cut, that may be upon the said
 “ lands of Westwood at my decease, and likewise the
 “ household furniture before conveyed and assigned to
 “ Mary Johnston my spouse, and the foresaid Agnes
 “ Bryden and children, surrogating hereby and substi-
 “ tuting the said William Grierson, James Broatch, and
 “ William Walker, whom failing, the heirs male or
 “ female of the foresaid John and Adam Bryden before
 “ described, in my full right and place of the premises,
 “ with power to them, in the order of succession fore-
 “ said, after my decease, to intromit with the said debts
 “ and effects, uplift, discharge, use, and dispose thereof,
 “ the same as I could have done myself if in life.
 “ And considering that I hold a conveyance from
 “ Mungo Dobie, writer in Dumfries, now in Lockerbie,
 “ dated the 13th day of November 1805 years, to an
 “ heritable bond over the lands of Scrogs for payment
 “ of 500*l.* sterling, redeemable, if not paid up before

“ my decease, it is my will and I hereby appoint
 “ that the yearly annuity of 20*l.* sterling, left by me
 “ to the said John Bryden as aforesaid, shall be paid
 “ from the annual interest arising therefrom so long as
 “ the said Mary Johnston my spouse is in life, and at
 “ her death I hereby give, grant, assign, and dispo-
 “ ne the said heritable bond of 500*l.* sterling, and convey-
 “ ances thereof in my favour, to and in favour of the
 “ lawful children hereafter to be procreated of the body
 “ of the foresaid John Bryden during his present or
 “ any future marriage, the lawful children procreated
 “ of the body of the foresaid deceased Adam Bryden,
 “ and the children lawfully procreated or to be pro-
 “ created of the bodies of the before-designed Agnes
 “ Bryden and Janet Bryden, spouse of Andrew Dickson
 “ of Shaw, my nephews and nieces, also the surplus
 “ money, if any, after paying the foresaid legacies and
 “ every other debt justly owing by me, and that equally
 “ amongst them, share and share alike. And further,
 “ as I have full confidence in the integrity of the saids
 “ William Grierson senior, John Broatch, Alexander
 “ Walker, and William Martin, I hereby nominate
 “ and appoint them to be my sole executors and trus-
 “ tees for the express purpose of seeing this deed of
 “ settlement carried into full and final execution, and
 “ who are to receive a reasonable gratification for their
 “ trouble; declaring that any two of them shall be a
 “ quorum, and that the persons succeeding, before
 “ named, while in minority, shall and are hereby bound
 “ to do no act or deed relative hereto without their
 “ advice and consent; declaring also, that my said exe-
 “ cutors and trustees shall not be liable for omissions,
 “ but only for their own actual intromissions, nor shall

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“ they be liable for one another, but each of them for
 “ his own actual intromissions only. And further, I
 “ hereby revoke and alter all former dispositions, assign-
 “ nations, or deeds of settlement executed by me rela-
 “ tive to the foregoing lands of Westwood, Scalehill,
 “ and Herds Bogside; only declaring, that any other
 “ deeds executed by me relative to my other property
 “ not herein mentioned shall stand sure and be as
 “ effectual as if this deed had not been made or granted;
 “ reserving always not only my own life-rent right of the
 “ premises and subjects before disposed, but also full
 “ power and liberty to alter and revoke these presents,
 “ in whole or in part, as I shall think fit, at any time
 “ in my life, or even on death-bed; dispensing with the
 “ not-delivery hereof, and declaring these presents to
 “ be a good, valid, and effectual deed, though found
 “ lying by me at the time of my death, or in the cus-
 “ tody of any person to whom I may entrust the same
 “ undelivered,” &c.

On the 14th of July 1813, being two days after the date of this deed, Mr. Brown the testator executed a disposition and assignation, which, inter alia, contained this clause:—

“ And now, for the love, favour, and affection I have
 “ and bear to the children to be hereafter described,
 “ and for other good causes and considerations, have
 “ given, granted, assigned, and disposed, as I do
 “ hereby give, grant, assign, and dispoise from me and
 “ my heirs, to and in favours of William Grierson in
 “ Bucklerhole, John Broatch in Boraxfield, Alexander
 “ Walker in Fourmerkland, and William Martin,
 “ writer in Lockerbie, as trustees nominated and ap-
 “ pointed by me, for behoof of the surviving child or

“ children to be hereafter lawfully procreated of the
 “ body of John Bryden, merchant in Lockerbie, during
 “ his present or any future marriage, and the surviving
 “ child or children of Adam Bryden his brother, now
 “ deceased, my nephews, and their heirs male and
 “ female, equally amongst them, heritably but redeem-
 “ ably, not only all and whole the foresaid two several
 “ annual rents of 25*l.* sterling each, or such annual
 “ rents as shall correspond by law for the time to the
 “ foresaid two principal sums of 500*l.* each, to be up-
 “ lifted and taken at the term specified in the bond
 “ and disposition in security, and heritable bond before
 “ narrated, during the not-redemption forth of all and
 “ whole theforesaid lands of Scrogs, Moss-side, and Moss-
 “ head, and all and whole the lands of Moss-side called
 “ Catsbitt, with the teinds, parsonage, and vicarage of the
 “ said lands of Catsbitt, with the whole houses, yards,
 “ mosses, parts, pendicles, and pertinents of the same,
 “ or any part or portion thereof, but also all and
 “ whole the foresaid lands and others particularly above
 “ specified themselves, and that in real security and
 “ more sure payment to the said William Grierson,
 “ John Broatch, Alexander Walker, and William Mar-
 “ tin, trustees for the child or children of the before-
 “ designed John and Adam Bryden before described,
 “ and their foresaids, equally amongst them, share and
 “ share alike, of the foresaid two principal sums of 500*l.*
 “ sterling each,” &c.

Subsequent to the death of Mr. Brown, John Bryden
 had a family of four sons and four daughters ; and by them
 a declarator was raised against the trustees and the respon-
 dents, (the children of Adam Bryden,) concluding “ That,
 “ in virtue of the foresaid disposition and deed of settle-

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ment, on the arrival of any one of the children of the
 said John Bryden or Adam Bryden at twenty-one
 years of age complete, the pursuer, William Alexan-
 der Bryden, has, as the only heir male in heritage
 either of the said John Bryden, his father, or of
 Adam Bryden, his uncle, right to the whole of the
 foresaid lands of Westwood, (burdened with the life-
 rent of the disponer's widow,) as also the foresaid
 lands of Scalehill and Herds Bogside; or, on said
 event, the pursuers, William Alexander Bryden,
 Joseph Bryden, James Bryden, and Robert Bryden,
 have, as sole heirs male foresaid, right to the whole of
 the said lands; or, on said event, the whole pursuers,
 William Alexander Bryden, Joseph Bryden, James
 Bryden, Esther Bryden, Robert Bryden, and Agnes
 Bryden, or one or more, have right to certain shares
 or proportions of the said lands, either along with the
 said Jessie Bryden and Agnes Bryden, daughters of
 Adam Bryden, and also along with any other child
 or children who may be procreated of the body of the
 pursuer's father, the said John Bryden, during his
 present or any future marriage, or along with one or
 more of the said persons," &c. And that " the said
 William Grierson, James Broatch, and William
 Walker ought and should be decerned and ordained
 by decret of the Lords of our Council and Session
 to denude themselves of the said lands of Westwood,
 Scalehill, and Herds Bogside, or such parts or por-
 tion thereof as they may be infest in or possessed of,
 and to redispone the same, with all right and interest
 which they have or might have under the foresaid
 deed of settlement, to and in favour of the pursuer or
 pursuers, or one or more of them, according as they

“ may be found to have right to the whole or to certain
 “ shares of the said lands, and that as from the date when
 “ the said Jessie Bryden, or any other of the children
 “ of the said John Bryden and Adam Bryden, shall
 “ reach twenty-one years of age complete,” &c.

Lord Corehouse, on the 10th July 1830, pronounced this interlocutor:— “ The Lord Ordinary,
 “ having heard counsel for the parties, finds, that by the
 “ settlement of the late James Brown of Westwood,
 “ referred to in the libel, his widow, Mary Johnston, is
 “ entitled to the life-rent of the lands of Westwood:
 “ Finds that the sons born or to be born of John
 “ Bryden are entitled to one half of the said lands of
 “ Westwood, subject to the widow’s life-rent, and to one
 “ half of the lands of Scalehill or Herds Bogside, share
 “ and share alike: Finds that the daughters of the late
 “ Adam Bryden are entitled to one half of the lands
 “ of Westwood, subject to the widow’s life-rent, and to
 “ one half of the lands of Scalehill or Herds Bogside,
 “ as heirs portioners: Finds that the defenders, the
 “ trustees under the said settlement, are bound to
 “ denude, in terms of these findings, in favour of the
 “ sons of John Bryden, as soon as the eldest son arrives
 “ at the age of twenty-one years, good and sufficient
 “ security being found by the sons then in existence
 “ that the interests of any son or sons who may after-
 “ wards exist shall not suffer prejudice thereby; and
 “ that the trustees are bound to denude, in terms of the
 “ said findings, in favour of the daughters of the late
 “ Adam Bryden, as heirs portioners, as soon as the
 “ eldest daughter attains the age of twenty-one years,
 “ and decerns and declares accordingly: Finds the de-
 “ fenders, the trustees, entitled to expenses of process,

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“ to be paid out of the trust estate, and remits the
 “ account, when given in, to the auditor to be taxed,
 “ but finds no other expenses due. *Note.*—The settle-
 “ ment admits of various constructions. The dispositive
 “ clause could not have been more obscure, though
 “ industriously written to conceal the testator’s will, and
 “ no other clause in the deed throws any light upon it.
 “ The Ordinary has adopted the construction which,
 “ upon the whole, appears to him the least objection-
 “ able, but with little confidence in his opinion.”

All parties having reclaimed, the Court, on the 17th
 February 1831, pronounced this interlocutor:—“ Ad-
 “ here to the interlocutor reclaimed against, with this
 “ variation, that the trustees were and are bound to
 “ denude in favour of the sons of John Bryden, in so
 “ far as regards their one half of the properties in ques-
 “ tion, as at the period when the eldest daughter of
 “ Adam Bryden attained the age of twenty-one: Find
 “ the pursuers and defenders appearing equally entitled
 “ to the expenses respectively incurred by them, out
 “ of the properties in question, the first and readiest
 “ of the rents and profits thereof; appoint accounts of
 “ said expenses to be given in, and remit the same to
 “ the auditor to tax and to report; and, quoad ultra,
 “ refuse both reclaiming notes, and allow separate ex-
 “ tracts to go out at the instance of the daughters of
 “ the said Adam Bryden and the sons of the said John
 “ Bryden, and decern.” *

Against this interlocutor the children of John Bryden
 brought an appeal.

Appellants.—If the eldest son of John Bryden is not entitled to the whole lands as the sole heir male of the body of John Bryden or Adam Bryden, the whole lands must belong to the sons of John Bryden, born or to be born, and that to the exclusion both of the two daughters of Adam Bryden and the daughters of John Bryden. Under any circumstances the lands are now divisible among the whole children of John Bryden, born or to be born, and the two existing children of Adam Bryden, equally, or share and share alike. Even though the children of John Bryden were only entitled to one half of the lands amongst them, still there would be no reason for giving the whole to the sons so as to exclude the daughters.* The interlocutors of the Court appealed from are erroneous, and must be reversed, in so far as they direct any part of the expenses of the process to be paid out of the heritable bonds referred to.

Respondents.—The sound construction of the settlement demands that the succession be divided in a bipartite ratio, and that one just and equal, pro indiviso, half thereof be immediately disposed to the respondents, share and share alike, as heirs portioners.

LORD CHANCELLOR.—My Lords, in this case I would move your Lordships that the judgment of the Court below be affirmed; and I do so, as your Lordships will immediately perceive, for this reason,—not because the instrument in question can be thought unambiguous, or

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* *Fairservice v. Whyte*, June 17, 1789, *Morr.* 2317 and 14486; *Dollar v. Dollar*, Dec. 4, 1722, *Morr.* 13008; *Duncan v. Robertson*, Feb. 9, 1813, *Fac. Coll.*

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its construction clear and free from doubt; on the contrary, it is precisely for the opposite reason,—it is because of the great obscurity in this instrument, the great difficulty in coming at what really is the meaning upon the whole case, the inconsistencies which prevailed, and the perfectly inconceivable possibility of the party who made it having had any precise or definite meaning in forming it. The Court below having put a construction upon it,—the learned Judges before whom it came having come to an opinion upon the meaning of the instrument,—I can see no reason to be so far dissatisfied as to prefer any other given construction to that. It is for this reason that I am bound to submit to your Lordships, after a few remarks, the propriety of not dissenting from the decision of the Court below, rather than of adopting it. My Lords, three principal points have been urged on behalf of the appellant, whose case was argued with very great ingenuity by the learned counsel whom your Lordships have just heard. Upon each of those I shall offer a few observations. The first is that which relates to the gratuitous assumption, as it is called, in the Court below, of the word “their,” in point of law, being referable, not to John and Adam, but to the children of John and Adam as the antecedent. With respect to the alleged absurdity of the construction put upon it, I would observe, that a fact at that time existing was certainly known to the maker of the instrument,—the death of Adam, at the date of the instrument, without leaving male children. Now, my Lords, first, with respect to the bipartite division, the grounds upon which I think it is fair to contend that the division is excluded per capita, and is to be taken per stirpes, are, in the

First place, the words “each of their bodies,”—the first part of the clause in that portion of it which is said alone to throw doubt on the clause in question, “share “and share alike, the heirs male of each of their bodies “always excluding the female.” Now, the female of what? It must be the heirs female of somebody; but then there is nothing, as it appears to me, to supply the words which are wanted, except the words which are found to precede “each of their bodies, the heirs male “of each of their bodies excluding the female.” It must mean the same bodies, the heirs female of each. Then we have in the subsequent part the word “child” substituted, — “no male child or children in either or “each of their families.” Now, then, my Lords, from the expression in both of these two portions of this material clause, it appears to me that they contemplate the stirpes rather than the capita; but I rest not upon that, but what immediately precedes. Indeed the whole structure of the instrument shows that the party making it had in consideration two families,—that is, the family of John and the family of Adam. It is conveyed in a line, as it were, to the families of John and Adam; and accordingly they are referred to in this as “the children “lawfully procreated of the body of the said deceased “Adam Bryden, and the children to be hereafter law- “fully procreated of the body of the said John Bryden.” But, thirdly and lastly, and most materially, with a view to the bipartite division, and the question of stirpes and capita—in favour of stirpes there is this consideration, which presses strongly upon my mind:—If you are to take it per capita, and to deal with all the children of whichsoever of the brothers, in the self-same way—to throw them into one mass, and to treat them as the

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argument for the per capita would do, dividing the property among the whole of them equally, share and share alike,—then observe, my Lords, if you stop short of the portion of the instrument which is said alone to throw any doubt upon it, and which is (for so far I agree with the argument of the appellant) that which renders the construction difficult, and in some respects hardly attainable, in this case,—if you are to stop short, beyond a doubt you must say, in order to be quite consistent with this construction, that the children of both brothers shall take share and share alike. But then comes the preference given of males over females. How can you reconcile that with the distribution per capita, and with the admitted fact, in the first instance, of the two daughters of Adam known to be in existence at the time of Adam's death being recited? How can you reconcile that with the throwing of the whole children of both brothers into one mass, and dealing with them all alike, when nevertheless at the same time you are directed to adopt such a construction as shall, in the event of there being no male child to either of the brothers, give the whole to the daughters as heirs-portioners, or give the whole to the males in preference to and exclusion of the females, though there be males and females in one, and no males in the other? In either of those cases, according to that construction, the daughters of Adam would be absolutely excluded, and the children of John would take alone any share of this kind, because it would stand thus:—There are sons of John,—there are only daughters of Adam;—you are to take the whole children of John and the whole children of Adam, and deal with all alike, and apply that clause, to all alike, giving the preference to the male and excluding the females;—and

then the result is, that there being the whole mass to be all dealt with in like manner, sons and daughters, it seems immaterial whether the sons and daughters are children of the one, or the sons are all of the one, and the daughters all of the other, for it might have happened that one brother had sons when the other brother had daughters only; and then, in either or all of those cases alike, you will have to exclude the daughters of Adam, and give the whole to the sons of John. Now, that is utterly inconsistent with the fact that Adam had at that time died without leaving sons. I do not go out of the instrument, for his death is recited here — “ of the said “ deceased Adam Bryden;” and the very first gift, which is clearly part of the clause, is,—“ I hereby give, “ grant, and dispose to and in favour of the children law- “ fully procreated of the body of the said deceased Adam “ Bryden, and the children to be hereafter lawfully “ procreated of the body of the said John Bryden.” It cannot, therefore, treat them all in the same way, and value them all in one number, dealing with them all in like manner, the males as well as the females, without excluding the daughters of Adam, who are nevertheless the first and foremost objects of the bounty in that part of the instrument under which the parties took; and this can only be made clear by having recourse to the last supposition, that “ their ” is to be referred to the children, and not to the parents.

This leads us to the second of the points to which your Lordships have been directed. Now, I am of opinion, that you cannot say “ their ” refers to the children, and thus deals with the children, but that it refers to the parents, and not to the children, and this for these two reasons:—Your Lordships see that it is,

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in the first place, in favour of “ the children lawfully
 “ procreated of the body of the said deceased Adam
 “ Bryden, and the children to be hereafter lawfully
 “ procreated of the body of the said John Bryden,
 “ equally amongst them, share and share alike, the
 “ heirs male of each of their bodies always excluding
 “ the female.” Now, in going on and treating on the
 same matter, must not “ their bodies” be naturally taken
 in conjunction with the two persons before mentioned—
 that is, “ the heirs-male of each of their”—that is, John
 and Adam’s — “ bodies always excluding the female,”
 who have been the last referred to — not in a former
 clause—not in another part of the instrument, but in
 the same breath, as it were,—in the very same sentence
 upon part of which we are now attempting to put a con-
 struction. I need hardly stop here to refer your Lord-
 ships to a word which was not observed upon by the
 learned counsel for the appellant. Amongst all the
 inaccuracies and inconsistencies and repugnances which
 this clause affords, I hardly stop to mention that the
 word “ always” affords another instance of this,—the
 “ heirs male of each of their bodies always excluding the
 “ female.” My mind can apprehend no definite or in-
 telligible meaning of the use of the word “ always” here.
 We know the use of the word “ always” in limitations of
 this description ; we know what its ordinary application is.
 It is with a view to contract an obligation at a future time;
 it is with a view of prospect to the distribution of rights
 afterwards. It means, that at whatever time they shall
 come in esse, the heirs male or heirs female, in the event
 of there being no male child or children, the eldest
 daughter or heir female always succeeding without divi-
 sion—that is one ordinary expression ; and in the event

of the question of right being, not as respects one heir-portioner over another, but the privilege of males over females, the heirs male or the sons always excluding the daughters or heirs-portioners. No doubt, that is consistent, as it is technically urged, where it is intended to carry the matter perpetually, or at least as long as the term continues; but it has no intelligible meaning when it is applied to one particular punctum temporis in a matter where it is admitted on both sides that every thing bears a reference to that particular date—the coming of age of the eldest son, which I understand is admitted on all hands to be the time of the trustees denuding themselves, and conveying to the person entitled. I can understand “always” in the former sense, in which it is uniformly used, but in this case I can affix no definite meaning to it; but, as far as my observation goes, it is favourable to the construction put, on the behalf of the appellant, upon the word “their” being referable, not to the parents, but to the children; for that would be making some use of the word “always,” inasmuch as this construction does not confine you to one particular date; however, that does not appear of itself to be sufficient. Then, my Lords, the second ground upon which I am disposed to object to that construction, and more material indeed than the former, is, when you come to the words “heirs male of each of their bodies always excluding the female, and in the event of there being no male child or children in either or each of their families.” Now, “either,” must be observed to be indicative, not of any indefinite number—for two is the number by the construction I am now speaking of,—but an indefinite number of families must be the number, according to

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the construction against which I am now contending, namely, the construction which refers the word "their," not to John and Adam, but to the children at any time of John and Adam; but the words are, "either or each of their families." Then I should say that "either or each of their families" means, according to my views of it, either or each of John and Adam's family; — "then and in that case the daughters shall succeed as heirs-portioners." Now, it was argued, and very ingeniously, by the learned counsel who last addressed your Lordships, and who took to pieces the last part of the respondents case, that the counsel for the respondents put in the words "share and share alike" to suit their purpose, which no doubt they did; and he also contended, that the words, "in that family in which there shall be no male child or children," after the word "daughters," are equally arbitrary. But, my Lords, you must make sense of the thing, even where it is not plain, by giving some meaning to it. "Then and in that case the daughters shall succeed as heirs-portioners." Now, two observations immediately arise upon this, each of them in favour of the argument that I am putting. The daughters—but the daughters of whom? What daughters? It must be the daughters of somebody, and it must be the daughters of that family. The last antecedent is, "their families," — "in the event of there being no male child or children in either or each of their families, then and in that case"—whatever families are there meant—"the daughters shall succeed as heirs-portioners." What daughters? Surely the daughters of that family,— "either or each" being distributive and parting words, and words severing in their nature—

the very office of the words being distributive; and to make matters respective and distributive, and also being distributive of a particular kind between two, rather than among a greater number, it is the daughters of that family shall succeed. Whichever of the families is without male children, the daughters of that family shall succeed as heirs-portioners. But again, heirs-portioners of what? And this is the other observation that I wished to make. They must be the heirs-portioners of something. Heirs-portioners of what? They are to succeed as heirs-portioners—that is, to take portion among themselves. I will not go so far as to say, that in the last limb or the last sentence of the respondents case they have a right to add to the words “shall succeed” these words, “to the share which would have fallen to the male child or children in that family, had there been any such.” That is one good way of putting it for their purpose; and perhaps we can hardly see any other meaning than that, or something approaching to it. But, without going so far, I should say it must mean heirs-portioners of that share. Portioners implies sharers, and heirs-portioners must be the persons who are to portion among them the share belonging to that family. It is a moiety in fact. It is needless to go to that alleged gratuitous construction of all these words which I have read to your Lordships, but the words must mean heirs-portioners of that moiety. But I take it that the words “heirs-portioners” are inaccurate. Nothing can be more inaccurate than talking of persons taking as heirs-portioners under a settlement. It is not very intelligible, as it appears to me, to speak of heirs-portioners in a division into two portions, one of which portions should go to the females, who should

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take as heirs-portioners, in the event of one family failing in males. Upon the whole, therefore, I am inclined to think that, on the second point, "their" is to be referred to Adam and John, and not to their children.

The third matter, which I stated I should observe upon, is that which appears chiefly to have been pressed on the consideration of the Court below—the fact of Adam's death,—a fact known to the maker of the instrument, for he recited it; and he must have known that Adam had daughters, for he refers to the issue of Adam. But it must be quite evident to your Lordships, from the whole instrument, that it was not a man of business who drew the instrument; nevertheless we must endeavour to understand his view; we must take for granted that he knew something about it; that he had some, however indefinite, meaning attached to it; that he had a consistent meaning, and that his meaning was known to himself. This we are bound to assume, in order to put any construction upon the instrument. The words are,—“and in the event of there being no male “child or children in either or each of their families,” that is to say, in the event which has happened with respect to one of the families, inasmuch as Adam has died without male issue, and the event which may or may not have taken place as to John's family,—John being married, but not having any children,—then I provide so and so. But it is a fairly conceivable construction, it implies the grossest inaccuracy in the use of language, because the words that limit are words of contingent and prospective aspect, and they would much more apply to an uncertain than to a certain event, and would apply much more to the future, and what has not happened, than to what has happened, and is finally and irrevocably fixed.

This, my Lords, may be said to be a strong construction ; but I think that it leads to as little inconsistency and difficulty as any other would do.

For these reasons I am inclined to think that the Court below has come to a right conclusion ; but I am of opinion, at all events, that the conclusion having been come to, — this construction having been given to the instrument by the Court below, and seeing no grounds to adopt another construction as decidedly preferable to it,—I am not prepared to move your Lordships to reverse the decision. I hope I have made myself understood as not by any means undervaluing the weighty arguments used by the learned counsel. So far from wishing to do so, I cannot but own that their reasoning appeared to my mind most ingenious ; and when I say ingenious I do not use the word in the sense in which it very frequently is applied ; for it is not to be denied that there are solid objections against the construction in question ; there are difficulties, serious difficulties, in this construction ; but every other construction is encompassed, in my mind, with at least equal, and—as regards any that I have been able to apply my mind to—with greater difficulties ; and it is because this one is pressed with, on the whole, less difficulty than any other, that I would move your Lordships not to alter this decision. My Lords, the Court below were quite aware of these difficulties,—they came to their decision with the greatest doubt,—they felt the full pressure of those difficulties. For this reason I shall not of course recommend that any costs should be given ; but I go further, and think, that the costs of appeal, as well as in the Court below, should be paid out of the estate. The judgment in the Court below was, that the expenses should be paid out of the

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No. 24. heritable bonds, but I should think this must be by
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The House of Lords pronounced this judgment:—Find, that the interlocutor of the 17th of February 1831, complained of in the said appeal, ought to be varied in so far as it finds the parties respectively entitled to their expenses out of the heritable bonds therein mentioned: And it is therefore declared, That all such expenses, and also the costs of both parties of this appeal, and the proceedings thereon, ought to be paid out of the first and readiest of the rents and profits of the said lands of Westwood, Scaleshill, and Herds Bogside: And it is ordered, That the said interlocutor, with this variation, be and the same is hereby affirmed.

A. M. M'CRAE—ALEXANDER DOBIE, Solicitors.

[1st June 1833.]

Sir WILLIAM F. ELLIOTT and his Trustees, Appellants. No. 25.
 —*Lord Advocate (Jeffrey)*—*Dr. Lushington*.

The Earl of MINTO, Respondent.—*Knight—Murray*.

Testament — Trust — Clause. — Circumstances in which it was held (affirming the judgment of the Court of Session) that a testator's intention was to subject certain trust funds and estate to the payment of his debts, and to free certain property in England from that liability; and effect given to the testator's intentions.

IN the month of February 1806, the late William Elliott of Wells executed a deed of entail and also a trust deed. By the deed of entail he disposed the lands of Wells, the baronies of Ormiston and Hadden, together with other lands under the fetters of a strict entail, to himself and the heirs male of his body; whom failing, to Sir William F. Elliott. The following clause was contained in this deed:—" I hereby
 " bind and oblige me and my heirs at law, and my
 " executors and successors, to free and relieve the said
 " lands and estate, and the heirs of tailzie that shall
 " succeed thereto, of all debts to which I shall be liable
 " at the time of my death." A power to alter and
 revoke was reserved.

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By the trust deed Mr. Elliott conveyed to the late

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Earl of Minto and others, as his trustees, the whole lands and estates contained in the deed of entail, and the whole of his other property, heritable and moveable, for the payment, inter alia, of all his just and lawful debts then due, and which should be due by him at the time of his death. The trustees were invested with power to sell the lands of Ormiston and Hadden for payment of the debts, but they were authorized to dispense with a sale if they could pay off the debts by degrees out of the surplus rents or other funds falling under the trust.

In December 1809 Mr. Elliott executed a supplementary deed of settlement, by which he nominated the Earl of Minto to be one of his trustees, and which contained the following clause:—" I hereby
" anxiously repeat, that the said debts and others may
" be gradually satisfied and extinguished out of the rents
" and profits of my said entailed estate, and any other
" funds falling under the said trust." And " whereas
" I am possessed of certain funds and effects situated in
" England, which I may dispose of by deed in the
" English form ; therefore I hereby declare, that any
" such deed executed by me, and unrevoked at my death,
" shall carry right to the said funds and effects situated
" in England, so far as they are thereby conveyed,
" settled, or bequeathed, and the same shall not be held
" or considered as falling under my foresaid trust deed ;
" and I hereby ratify, approve of, and confirm the fore-
" said trust disposition."

In July 1813 Mr. Elliott executed a deed of codicil, directing his trustees to pay sundry legacies and annuities, and ratifying and confirming the foresaid deed of entail and trust disposition. On the 4th July 1816 Mr. Elliott executed a settlement in the English form,

containing the following clause :—“ All my books, and
 “ whatsoever effects and property, I give and bequeath
 “ unto the foresaid Earl of Minto, on condition that
 “ he pays unto Ambrose Glover, Esq., of Ryegate,” &c.
 the sums therein mentioned. “ And I do hereby
 “ appoint the said Gilbert Earl of Minto and Ambrose
 “ Glover, Esq., executors of this my last will and testa-
 “ ment; and I also hereby confirm the entail and trust
 “ deed before mentioned.”

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In July 1818 Mr. Elliott sold the lands of Ormiston to Mr. Mein for 28,000*l*. One of the objects of the sale was to pay off an heritable debt of 15,000*l*. affecting that property. Of the purchase money 16,000*l*. was remitted to London by Mr. Mein; and thereafter 15,000*l*. of this sum (being the amount of the bond) was, by the direction of Mr. Elliott, invested in the three per cent. consols until the term of payment in the bond arrived.

Mr. Elliott died in October 1818, before the heritable debt on Ormiston was paid off, and while the money continued invested in the funds. A dispute thereafter arose between Sir William F. Elliott, as heir of entail, and the Earl of Minto, as administrator under the English will, regarding this sum. After considerable discussion a judgment was pronounced by the Court of Session, and afterwards affirmed by this House*, by which the 15,000*l*., though carried by the English will, was held to be so carried under the obligation, on the part of the Earl, to relieve the trust estates of the heritable debt, for payment of which it had been transmitted to England. In consequence of this decision the Earl of

* Ante, Vol. II. p. 678.

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Minto sold out the sum vested in the funds, and made over the proceeds to the trustees; but having applied the remaining property situated in England to his own private use, Sir W. F. Elliott raised an action, (afterwards insisted on by him and his trustees) against his Lordship, concluding that it should be found that the property in England, so far as required for paying off the debts and obligations, had been wrongously and unjustly taken possession of by his Lordship, and that the same pertained to Sir W. F. Elliott, or to the trustees of Mr. Elliott; or otherways that the Earl of Minto was bound, out of that property, to free and relieve Sir W. F. Elliott and the other heirs of entail of all the debts and obligations affecting the entailed estate, and that his Lordship was bound to relieve him and the heirs of entail, and the rents of the estate, of the whole interest due on the debts and obligations, from the death of the testator, &c.

In defence Lord Minto pleaded, that according to the legal construction of Mr. Elliott's deeds of settlement the combined operation of them was to subject the trust funds and estates to the payment of his debts, while the property in England was withdrawn from that liability, and bequeathed to Lord Minto, subject only to the specific burdens created by the will.

On the 7th July 1829 the Court pronounced the following interlocutor:—"The Lords, on the report of
" the Lord Ordinary, having considered this process, with
" the closed record cases for the parties, and other proceedings, and having heard counsel thereon, sustain
" the defences, assoilzie the defender from the conclusions of the libel, and decern: Find the defender
" entitled to his expenses, allow an account thereof to

“ be given in when lodged, remit to the auditor to tax
 “ the same.”* Expences were decerned for on the 14th
 of November.

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Sir William F. Eliot and his trustees appealed.

Appellants.—The clause in the deed of entail whereby Mr. Elliott bound and obliged himself, “ and my heirs
 “ at law, and my executors and successors, to free and
 “ relieve the said lands and estate, and the heirs of
 “ tailzie who shall succeed thereto, of all debts to which
 “ I shall be liable at the time of my death,” is conceived
 so as to apply, not merely to the case of intestate, but
 also to that of testate succession. The Earl of Minto
 was the universal successor of the late Mr. Elliott in
 England. A universal legatee is liable in payment
 of the debts of the testator, and consequently is subject
 to the operation of the clause in the deed of entail,
 binding the heirs, executors, and successors of Mr. El-
 liott in the payment of his debts. In questions inter
 hæredes it is of no consequence for an heir who is liable
 in payment of debt to be able to point to a nearer heir,
 and to say that he must relieve him, unless he can also
 show that such nearer heir was in some way or other
 lucratus by his succession to the deceased.† In point of
 general legal principle, the question in the present case
 is precisely the same as that which was formerly decided
 between the same parties.

* 7 S. & D. 845.

† See Fount. Nov. 12, 1680, Stevenson compared with, July 12, 1734; Lady Kinfauns, both observed in Folio Dict. v. ii. p. 133, 134; and Clerk Home, 76; Durie, March 10, 1627; Forrester, Durie, March 8, 1626; Traquair, Forbes, Dec. 16, 1712; Monro, July 7, 1732; Strachan observed in Folio Dict. v. ii. p. 133.

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Respondent.—The evident intention of the late Mr. Elliott, as well as the ordinary rules of law applicable to special testamentary donations, infer an exemption of his English property from general liability for his debts; and such exemption is established by the express terms of the settlements, which absolutely exclude the contrary supposition. The judgment pronounced in the former question proceeded upon a speciality applicable only to a particular part of the funds in England, which excludes by necessary inference the plea of general liability for the testator's debts, now sought to be attached to the other English funds.

LORD CHANCELLOR.—My Lords, whatever doubts I might have entertained, had I been called on to consult with your Lordships in the former case, respecting the 15,000*l.* disposed of in this House by appeal from the Court of Session — (and many grave doubts were entertained, and among persons who attended to the subject, and very great difficulties were pressed in argument by those who argued it here, as well as in the argument of Lord Gifford,)—my advice to your Lordships in the ultimate decision, would be for affirming that judgment of the Court of Session; and in offering this recommendation I certainly have no doubt whatever. I see it in the same light in which it has appeared to the learned Judges below, and I will not detain you further than by simply moving that the interlocutors of the 7th of July and the 14th of November be affirmed.

LORD WYNFORD.—My Lords, I will just state to your Lordships, that I have not, from the beginning to the end of this case, entertained the least doubt. I think

this case entirely distinguishable from that which was decided in this House, where your Lordships had the assistance of Lord Gifford. If I had had the honour of sitting in this House on that occasion, I should have concurred entirely in the opinion my Lord Gifford delivered to your Lordships. My Lord Gifford was of opinion that that 16,000*l.* was an exception out of the rule; whereas, if we were to say that the judgment of the Court below is not correct, we should get rid of the rule altogether, and render that provision, which this eminent person has made as to the English property, entirely inoperative. It is a question of intention, as the Lord Advocate has argued for some time;—no doubt his intention was that this property should go to Lord Minto, unfettered by any application for the payment of debts in Scotland; yet, if the judgment of the Court below is wrong, that intention will be entirely defeated, and not the least effect can ever by possibility be given to that design. For this short reason, my Lords, without going further into the case, I entirely concur with my noble and learned friend, that the judgment of the Court below ought to be affirmed.

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The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the several interlocutors therein complained of be and the same are hereby affirmed; and it is further ordered, That the appellants do pay or cause to be paid to the said respondent the sum of 200*l.* for his costs in respect of the said appeal.

HALL & BROWNLEY—SPOTTISWOODE & ROBERTSON,
Solicitors.

[18th June 1833.]

No. 26. DAME HELEN MAITLAND GIBSON and Husband, Appellants.—*Attorney General (Horne)—Lord Advocate (Jeffrey)*.

A. CHARLES MAITLAND and others, Respondents.—*Tinney—Dr. Lushington*.

Entail—Statute.—An heiress of entail under a canal statute obtained 120*l.* per acre for land used for the canal, and a further sum for her consent to a new line deviating from a former one, and which approached nearer to the mansion house than the original one—Held (affirming the judgment of the Court below) that she was bound to re-invest the sum obtained for such consent, for behoof of the heirs of entail.

2D DIVISION.

Lord Medwyn.

THE estate of Clifton Hall was possessed by the appellant under the fetters of a strict entail executed by her ancestor, Alexander Gibson, in April 1786, and recorded in the register of tailzies in May 1823. By an act of parliament passed in the fifty-seventh year of George III. a corporate body was established, under the name of "The Edinburgh and Glasgow Union Canal Company," for the purpose of forming a canal from the Lothian Road, near Edinburgh, to join the Forth and Clyde navigation near Falkirk. This company was invested with powers to purchase whatever land was necessary for the navigation, on paying the value

thereof, and indemnifying the proprietors for any damage or inconvenience thereby sustained. The act also provided, that the value of the land used and the damage incurred might be settled by private arrangement between the company and the proprietors; and in case the parties could not agree, it was to be estimated by the verdict of a jury.

The line of the Union Canal, as authorized by the act, passed through the estate of Clifton Hall, but at a considerable distance from the mansion house and pleasure grounds; but before commencing their operations the company discovered that a much more advantageous line lay nearer to the mansion house of Clifton Hall. Accordingly various communications respecting this new line took place between the appellant and the canal company; and by a deed of agreement, dated the 18th October 1818, the company agreed to pay to the appellant 7,000*l.* for her consent to the deviation, besides the value of the ground, and in 1819 the company obtained a second act of parliament to sanction this deviation. The company required rather more than nine acres, which, at 120*l.* per Scots acre, amounted to 1,181*l.* 10*s.* 5*d.* This sum the appellant invested for the benefit of the heirs of entail in terms of the statute, but she refused to apply the 7,000*l.* in a similar way. The respondents, as heirs of entail, therefore brought an action of declarator and payment, concluding that the appellant was bound to re-invest or consign the sum of 7,000*l.*, in terms of the act, under deduction of a fair compensation for the temporary damage sustained during the operations of the canal company. After hearing parties, Lord Medwyn, on the 16th December 1830, pronounced this interlocutor:—"The Lord Ordinary

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“ having resumed consideration of the debate, and
 “ advised the process, Finds, that besides the sum of
 “ 1,181*l.* 10*s.* 5*d.*, the agreed on price of the land occu-
 “ pied by the Union Canal in passing through the estate
 “ of Clifton Hall, the defender must lay out and invest, for
 “ the benefit of the heirs of tailzie of the said estate, so
 “ much of the farther sum of 7,000*l.*, paid by the Union
 “ Canal Company to the defenders, as shall remain after
 “ making a fair compensation for the temporary loss or
 “ damage sustained by them during the progress of
 “ making and completing the works therewith connected;
 “ and appoints the cause to be called, in order to
 “ determine in what manner the amount of said com-
 “ pensation is to be ascertained.” “ *Note.*—It appears to
 “ the Lord Ordinary, that whatever sum is obtained by
 “ a proprietor possessing under a strict entail from the
 “ commissioners under a canal act, for liberty to pass
 “ through the said estate, must be secured for the
 “ benefit of the heirs of entail, except in so far as it is
 “ to cover temporary damage by loss of crops, destruc-
 “ tion of fences, injury to embellishments, &c.; but
 “ here it is said that the value of the land has been
 “ fixed at 120*l.* per acre, and that, over and above this,
 “ the sum of 7,000*l.* was paid for the consent of the
 “ heir in possession to a deviation in the original line
 “ of the canal, and that this consent might have been
 “ refused, or it might have been given gratuitously, and
 “ therefore that it is *jus tertii* to the pursuers that what
 “ might have been given has been sold. It is true the
 “ consent might have been withheld, and it might have
 “ been given gratuitously. These would have been
 “ reckoned within the powers of the heir, and in the
 “ *bonâ fide* exercise of his administration of the estate.

“ But since he has not done so, can he acquire a pecuniary benefit in virtue of the character of proprietor of the estate, without communicating it to the heirs of entail? The consent which he has given was as an heir of entail, and as being one of a series of heirs equally, though successively, interested in the estate; and in consenting to the alienation of part of it, he cannot stipulate for himself any advantage over the succeeding heirs: any other rule would give too much room for improper bartering of the rights of the future heirs. Besides, the contract in the present case distinctly states in the narrative, that the new line ‘would injure, in a considerable degree, the privacy of the said manor place and pleasure ground thereto adjoining;’ and yet the heir in possession claims right to put into her own pocket the sum which has been paid for permanently injuring the privacy, and, of course, the comfort, of this as a residence for all the subsequent heirs.”

To this interlocutor the Court adhered on the 15th February 1831*, whereupon the present appeal was brought.

Appellants.—The respondents, as heirs substitute of entail, have no right or interest beyond seeing that a fair equivalent is obtained for the land occupied by the canal, and that such equivalent is settled and secured for their behoof; and, in particular, they have no right or interest in the price or consideration which may have been given to the appellants to induce their consent to an alteration of the original line, which could not have

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been otherwise carried through. The manner of ascertaining the value of the land occupied by the canal, or, in other words, the equivalent to be set aside for the heirs substitute of entail, was authorized by the statute, and unexceptionable in itself, and secured them full and adequate compensation. In any circumstances the respondents, if dissatisfied with the equivalent, as ascertained by the voluntary adjustment, are not entitled to the remedy obtained from the Lord Ordinary, but merely to have it still referred to a jury, whether the consideration stipulated by the agreement as the equivalent for the land was in itself adequate or not, so as to give them restitution against any loss or damage which on that ground they may be able to substantiate.

Respondents.—The balance remaining of the sum of 7,000*l.* agreed to be paid by the canal company to the appellants, after deducting what may be requisite to compensate the temporary loss or damage sustained by the appellant, as the heir in possession of the estate, by the operations of the company, must be held to have been truly given for the land taken possession of by the company, or for permanent damage done to the estate by the canal being carried through it in the line then proposed, and finally adopted; and as such it belongs to the heirs of entail in terms of the seventy-fifth section of the act, and if not falling under the precise words of the act,—still the balance being the price of an advantage or accommodation belonging to the entailed property and not to the heir in possession, must, on general principle, be held as forming part of the entailed estate, and ought to be invested for the benefit of the heirs of entail in terms of the conclusions of the libel.

LORD CHANCELLOR.—My Lords, I confess that I never had any doubt upon the subject of this case during any part of the argument, but I thought it our duty to hear the learned counsel for the appellants; and in order to go into the question fully, I advised your Lordships yesterday to hear the case throughout. It did appear, from some matters thrown out on the part of the learned Judges before whom this case was brought,—as mentioned by the Lord Advocate,—that there was some doubt whether or not the question had been raised before their Lordships in the way in which it was argued here, and in the way in which it was argued before the Lord Ordinary, and in which the Lord Ordinary evidently considered it as settled. I myself entirely agree in the judgment which has been pronounced. I think it is not possible now to set it aside, and I think it is too late to take the case to any further inquiry. On this ground I would move your Lordships that the interlocutors be affirmed.

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The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellants do pay or cause to be paid to the said respondents the sum of 200*l.* for their costs in respect of the said appeal.

MONCRIEFF, WEBSTER, & THOMSON—SPOTTISWOODE
& ROBERTSON, Solicitors.

[27th June 1833.]

No. 27. ALEXANDER RINTOUL, Appellant.—*Dr. Lushington—Wakefield.*

ALEXANDER BOYTER, Respondent.—*Lord Advocate (Jeffrey.)*

Proving the Tenor.—Circumstances in which a decree of the Court of Session, holding the tenor of a destroyed deed proved, was affirmed.

Expenses awarded against a defender in a process of proving the tenor.

FIRST DIVISION. **THIS** action was instituted for the purpose of establishing the tenor of a deed of settlement, and was brought at the instance of the respondent, Alexander Boyter, against the appellant Alexander Rintoul, and Thomas Rintoul, shoemaker, in Sunderland. The deed was alleged to have been fraudulently abstracted and destroyed by the latter, and to have been of the following tenor:

“ We, Alexander Boyter, grocer, Balmerino, and
 “ Helen Rintoul, spouses, from our mutual affection to
 “ each other, and with mutual advice and consent, do
 “ hereby make, constitute, and appoint the longest
 “ liver of us to be the first deceaser’s sole executor and
 “ universal legator, with full power to intromit with
 “ the whole moveables and executry of every description
 “ of the first deceaser, to give up inventories thereof,
 “ and to confirm the same, and generally to do every
 “ thing in the premises competent to an executor, but

“ under the burden always of the just and lawful debts
 “ and funeral charges of the first deceiver; and we dis-
 “ pense with the delivery hereof, and declare that these
 “ presents, though found lying beside either of us at
 “ the time of our death, or in the custody of any other
 “ person undelivered, shall be as valid and effectual to
 “ the survivor as if the same had been duly delivered;
 “ and we consent to the registration hereof in the
 “ books of Council and Session, or others competent,
 “ therein to remain for preservation; and for that pur-
 “ pose we constitute our procurators, &c. In witness
 “ whereof these presents, written by Charles Mather,
 “ clerk to James Hunter, writer, Dundee, are subscribed
 “ by us at Dundee, the 28th day of December 1827
 “ years, before these witnesses, the said Charles Mather
 “ and David Myles, also clerk to the said James Hunter.

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“ ALEXANDER BOYTER.

“ CHARLES MATHER, Witness.

“ DAVID MYLES, Witness.

“ At the desire of the above-mentioned Helen Rin-
 “ toul or Boyter, and by authority from her, who
 “ declares that she cannot write, and she having, in
 “ token of the authority given to me, touched my pen,
 “ I, notary in the premises, do subscribe for her, the
 “ before-written deed having been previously read over
 “ to the said Helen Rintoul or Boyter in presence of
 “ me and the witnesses before designed. Nil nisi
 “ verum.

(Signed) “ JAMES HUNTER, N. P.”

It was alleged, that after the death of Helen Rintoul in June 1829, when the settlement came into operation, that it was read, after her funeral, in the presence of her nephews (the appellant and his brother Thomas) and

No. 27. other friends; but that thereafter Thomas Rintoul, (the
27th June appellant's cousin), surreptitiously and violently took
 1833. possession of the settlement, and, having torn it to
 RINTOUL pieces, swallowed or otherwise put away the fragments;
 v. and within a few days thereafter an edict of executry
 BOYTER. was raised by the appellant in the character of nephew
 to the deceased.

The appellant alone appeared in the Court below, and lodged defences, stating in particular that Mrs. Boyter "did not execute a settlement of the tenor" mentioned in the summons," and denying that "the said settlement was read over in the presence of the persons mentioned," and also that any such deed was violently and fraudulently abstracted and destroyed by Thomas Rintoul.

In support of the action the respondent produced a mutual testament between Mrs. Boyter and her sister Agnes Rintoul, dated 21st June 1821, (which was proved to have been used as a style by the man of business who prepared the mutual settlement between the respondent and his wife); also a deposition of the appellant's country agent in the proceedings, at the appellant's instance, before the commissary, showing that that person had for some time in 1829 been in the possession of or had repeatedly seen a copy (taken by the appellant's son) of the deed in question; and parole evidence both as to the terms of the deed and of its destination.

Upon hearing the case argued the Lords of the First Division, on the 16th March 1832, pronounced this judgment:—"The Lords having advised the state of process, adminicles produced, and testimonies of the witnesses produced, and heard parties by their coun-

“ sel, Find the casus amissionis of the writ libelled, and
 “ the tenor thereof as libelled proved, and decern and
 “ declare accordingly: Find the defender, Alexander
 “ Rintoul, liable to the pursuer in the expenses.”

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Against this interlocutor the present appeal was brought.

Appellant.—The proof of the tenor of the document is by no means such as to have warranted the judgment pronounced. The deed is said to have been executed on or about the 28th December 1827. It is alleged to have been a mutual conveyance by the respondent and Helen Rintoul of the whole of the property, and in particular it is alleged to have contained that clause upon which the efficacy of the whole deed depended:—“ And we dispense
 “ with the delivery hereof, and declare that these pre-
 “ sents, though found lying beside either of us at the
 “ time of our death, or in the custody of any other
 “ person undelivered, shall be as valid and effectual to
 “ the survivor as if the same had been duly delivered.”
 But as to this clause there is no proof whatever.

By the judgment the appellant is subject to the whole costs of the action, while there are no grounds, either on principle or according to the practice of the Court, upon which such an award could have been pronounced. No expense has been caused by the appellant to the respondent, who would equally have been obliged to advance the whole of his proof although the appellant had not appeared. It is not even alleged that the appellant is chargeable with the destruction of the deed, and there cannot be produced any instance in which the expense of the proving of a tenor has been

No. 27. laid by the Court below on a defender, unless the deed
27th June sought to be proved had actually been destroyed by the
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Respondent.—The respondent adduced all the evidence to support his libel which could be reasonably required or expected under the very particular circumstances of the case. This is the case of a personal deed, and as such related to a settlement of moveables only, and therefore no deed connected with it (such as an instrument of sasine) fell to be entered on record, or could be obtained from any register. The loss of the deed arose from violence; it was forcibly and feloniously taken from the possession of the custodian, in the most unusual manner, in presence of a number of witnesses. It would be preposterous if the party injured by such an act had no remedy unless he produced the scroll of the deed or some other written evidence relating to it. But adminicles were produced; for another settlement was produced, which one of the instrumentary witnesses swore was used as a form or draft of the deed in dispute. And the deposition of the appellant's own agent showed that he was at one time possessed of a copy of the deed taken by the appellant's son. These, under the circumstances of the case, were sufficient written adminicles.

The parole proof adduced by the respondent was also most complete and conclusive in all points. The violent and fraudulent destruction of the will by Thomas Rintoul, in presence of the appellant's brother, who looked on without interference, was proved by an accumulation of evidence. The tenor or purport of the destroyed deed was equally clearly proved. The original execution of the will in question, and its

existence after Mrs. Boyter's death, was also distinctly proved.

The appellant was justly subjected in the costs in which the respondent was involved, by the fraudulent act of the party and his coadjutors who destroyed this will. For the appellant almost instantly after the felonious act attempted to avail himself of it by bringing all manner of actions against the respondent as in a case of intestacy. He thus adopted the fraud, if he was not antecedently privy to it. Besides, the appellant put forth a series of statements, in his defences, which were all proved to be false.

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LORD CHANCELLOR.—My Lords, if I could entertain any doubt in this case, I should suggest to your Lordships the propriety of taking time to consider before you affirmed the decision of the Court below, but I entertain no doubt. In the first place, by the judicious abstinence of the learned counsel on the other points of the case, the question is reduced simply to one upon the result of the evidence before you; and the learned Judges of the Court below having made up their minds on the examination of that evidence, and having thought that sufficient to satisfy them of the facts of the loss of the instrument, and of the instrument lost being of the tenor and effect stated,—which phrase “of the tenor and effect,” as your Lordships are aware, is used in the law of Scotland in a different sense from that in which we use it—we using it to express the very words of the instrument, they using it rather to express the purport of it,—the Court below being satisfied that the instrument so lost was of the tenor and effect which the party has alleged it to be, and proved it to be, it

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would certainly have required a very strong contrary opinion, to justify your Lordships in altering the decision thus pronounced. It is a case in which four or five learned Judges have made up their minds upon the result of the evidence before them; and it would be extremely difficult for any one to press upon your Lordships a contrary opinion, unless he entertained a very confident belief that they had gone wrong. But, my Lords, I see no reason whatever for thinking that the Court below came to a wrong conclusion. In the first place, it is perfectly clear a will was in existence; that Alexander Boyter and his wife, Helen Rintoul, came to the house of Mr. Hunter to have a will made for them. That is proved clearly by the evidence of David Myles, not contradicted at all by the evidence of Charles Mather his fellow clerk, though I will not say (and so far I agree with the argument of the learned counsel for the appellant) that it is carried further by that evidence. The truth is, that one of those witnesses speaks to his recollection of certain facts specifically enough, and the other swears, as far as he goes, consistently with the recollection of that former witness; but he recollects very little about it. What he swears is consistent with it, but he says little in addition. But Myles says that they came, and that a will was made. He says it was copied either from the Style Book, (that is, the Book of Precedents, as your Lordships are aware,) or copied from the settlement of Mrs. Boyter and her sister in the office. There is no doubt that such a settlement between Helen and Agnes Rintoul, that is, Agnes Rintoul and Mrs. Boyter, was in the office; and that settlement being shown to him, this of course, refreshes his memory, and he says it was from

that. First he says it was either from the Style Book or the settlement; and when he sees the settlement, he says this, "that, to the best of his knowledge, that is the will which he thinks was copied on the above occasion." Therefore that settlement was copied to make a mutual will for Alexander Boyter and his wife; and then, as to his recollection of the contents, he states it with some particularity, which, without disbelieving Myles, makes it impossible to doubt there was at that time somewhat in the nature of a mutual will made by Alexander Boyter and his wife. Well, then, there is no appearance of evidence in the cause of any other will having been made by those persons, or for those persons. This will was made for them, and it was signed and attested, Myles says, by himself and Mather. Mather does not recollect whether he signed it or not—recollecting, in fact, nothing about it. Nor is it probable there should have been another will. Persons in their station, and at their time of life, were not very likely to have made more wills than were necessary. Then as to the depository—it is found in their house; and thus your Lordships come to the second part of the evidence, as to what took place immediately after the funeral, before the will was read, upon which you have some evidence of one of the persons present. The three witnesses present were James Mitchell, David Jack, and Robert Vietch, who all attended at the reading of the will, and they have deposed to the contents of the will as well as they could recollect, in a manner exceedingly natural and very trust-worthy. As far as they could recollect, it was a will of the husband and wife, and it left the property to the survivor of the two; that was the impression remaining upon their recollection. Now, is

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that or not consistent with the more particular account of the instrument given by a professional man, the clerk of Mr. Hunter, namely, David Myles, who gives you more in detail the provisions of the mutual will? It is perfectly consistent with it in every respect, though not so minute. Thus, we have the existence of a will proved, and then we have the act of spoliation most distinctly proved, for James Hardie and Mary Norrie were present at that flagrant and most criminal act of spoliation committed by Thomas Rintoul, the cousin of the present appellant. Now, Hardie swears that he read an instrument indorsed with this title, "Mutual Disposition between Alexander Boyter and Helen Rintoul;" and Mary Norrie swears she heard him read those words before the act of spoliation; that he read no more, for Thomas Rintoul immediately came behind him, snatched it out of his hands, tore it into pieces, endeavoured to swallow it, and, in short, committed an act of the most flagrant spoliation. Why, then, upon this evidence no jury would doubt for five minutes, before whom this question was brought; they would at once conclude that the will prepared at Hunter's office was thus destroyed by Rintoul; and that it was a mutual will between the two parties in favour of the survivor.

. There is also a little more evidence, which is not immaterial as to the conduct at least of the party here,—that is as to Thomas Rintoul, the son of the defender himself. He appears to have been sent to take a copy of the will, and I think it requires no wizard to conjecture who sent him there;—that he was sent by his father, in all probability, to take a copy of that will,—that he came back and brought it to the office of his employers, Campbell and Scott. It was taken in; but I do not go into the

observations to which the evidence of Mr. Campbell is undoubtedly liable. He may have forgotten some of the circumstances, he may have been partial to his clients, and prompted by zeal to give the sort of evidence he has given. I cannot say it would become me to express the least approbation of the proceedings in that office, if they were exactly as described by Mr. Campbell; but it would also be unjust to charge Mr. Scott, his partner, who is not examined upon this question, and respecting whose conduct, in writing the threatening letter, you have only the account given by his partner Mr. Campbell; but I think of this there can be no doubt, that some proceedings were in contemplation on the part of Alexander Rintoul, whether for a reduction or not does not very distinctly appear. In one part of his evidence he says he did not mean to have any reduction, and in another part he says there was a reduction in contemplation; but at all events there was something doing, either by way of threat to the party, or with the intention to effect a reduction; and at that time Campbell and Scott are proved to have had in their office a copy, more or less accurate, more or less legible (for there are great doubts on all those matters), of that very will, the will in question, copied by Thomas Rintoul the son. They seem to have had that in their office; what became of it does not so distinctly appear. I think it may be said, if it had contained any thing favourable to Alexander Rintoul—if it had contained any thing very inconsistent with the evidence which has been given in this cause, describing the tenor of this will,—we probably should have heard more of it. That, however, is a matter of no importance in the present stage of the question. I have no manner of doubt the Court below came to a right

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conclusion; and without shutting one's eyes to the facts—without straining in order to acquit Alexander Rintoul of all knowledge of what happened,—I think it is quite impossible to doubt that he misinstructed those solicitors who put in the defences, in which they positively deny all the leading facts of the case. To doubt that Alexander Rintoul was cognizant of what had happened,—was cognizant of the spoliation, and misinstructed his professional advisers who put in those defences, untruly denying those facts, would be to shut one's eyes against the whole light of the case. Therefore, my Lords, I think your Lordships will be well warranted in giving the expenses as well as the judgment against this party; and when you find they have appealed on several grounds, all of which are abandoned at your Lordships bar, except that upon which I will not say no appeal ought ever to have been lodged, namely, a mere question of fact, where there is little or no conflicting evidence, but upon which appeals ought most sparingly to have been lodged, I think your Lordships cannot have the least hesitation any more than the Court below had in allowing the costs of this appeal. My Lords, I trust that the learned counsel who sign the certificates—I am sorry once more to have to make the observation—I trust the counsel, in signing the certificate in such cases, will never depart from that scrupulous caution which ought to regulate the conduct, and I am sure does regulate the conduct, of all professional men in signing attestations. I hope they will ever bear in mind their duty to this House, and feel that they are bound to exercise the best of their judgment in giving their opinion upon such appeals. I only regret that it is not possible to visit the principal, Thomas Rintoul, in this case, with at least his

full share of the costs. That, of course, is entirely out of the question ; but the party who has profited by his spoliation, and who instructed his professional advisers to deny it,—that party was well visited with costs in the Court below, and I think ought also to be visited with the costs of this appeal.

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The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors therein complained of be and the same are hereby affirmed : And it is further ordered, That the appellant do pay or cause to be paid to the said respondent the sum of 147*l*. for his costs in respect of the said appeal.

G. W. POOLE—RICHARDSON & CONNELL, Solicitors.

[1st July 1833.]

No. 28. JANE WHITTET or GREIG and others, Appellants.—
Lord Advocate (Jeffrey)—Solicitor General (Campbell).

GEORGE RICHARDSON JOHNSTON and others, Respondents.—*Dr. Lushington—Murray.*

Testament—Substitute and Conditional Institute.—1. A testator, by his deed of settlement, conveyed his whole property to his daughter, under the burden of paying 2,500*l.* to each of his two grandchildren at majority; and in case of the death of either of them without children, the survivor to succeed to the share of the predeceaser; and in the event of the death of both without children, the testator's daughter "to succeed to the whole of what" is herein provided to them." The daughter granted an heritable bond to the grandchildren for their provisions, with the same destination as in the settlement; one of them died in minority, unmarried and intestate, but the other survived majority, and called up the money in the bond, but died unmarried and intestate, before receiving payment—Found (affirming the judgment of the Court of Session) that the representatives of the grandchild who survived majority (and not the testator's daughter) were entitled to succeed to the provisions; and that the heritable bond being merely a corroborative security made no change on the rights of the parties under the settlement.

Question, whether the destination was a substitution or a conditional institution?

2. A grandmother directed her trustees to pay the residue of her estate to her grandson, at Martinmas after his majority, and failing his surviving that term, or, if he did

survive it, failing his specially disposing the same, to accumulate the residue for behoof of the children of the testatrix's daughter; the grandson survived majority several years, and obtained payment directly from the debtor of the testatrix of a sum due to her, which he commingled with his other funds, and he died unmarried and intestate—Held, that this sum belonged to the representatives of the grandson, and not to the children of the daughter of the testatrix.

THE late John Whittet, of Potterhill, had two daughters, — Jane, now Mrs. Greig (the appellant), and Margaret, who married Mr. William Glen Johnston, residing in Perth, and died in August 1800, leaving two children, John Johnston and Wilhelmina Johnston. On the 12th May 1802, John Whittet executed a deed of settlement, by which he conveyed “to and in favour of
 “ the said Jane Whittet, and the heirs of her body, and
 “ her assignees; whom failing, my grandchildren, John
 “ Johnston and Wilhelmina Johnston, equally between
 “ them, and the heirs of their bodies; whom failing,
 “ to my sister's children, Henry and Janet Johnston,
 “ equally between them; whom failing, my own nearest
 “ heirs and assignees whomsoever,” his whole property, heritable and moveable, and in particular, certain lands and houses situated in the parishes of Kinnoull and Kinnaird, “ But always with and under the burdens
 “ and provisions after mentioned, viz,—Primo, The
 “ said Jane Whittet and her foresaids shall pay all
 “ my just and lawful debts, and the expenses of my
 “ death-bed sickness and funeral. Secundo, The said
 “ Jane Whittet and her foresaids shall pay to each of
 “ my grandchildren, John and Wilhelmina Johnston,
 “ the sum of 2,500*l.* sterling at the first Whitsunday

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“ or Martinmas after they respectively have attained
 “ the age of twenty-one years complete, with the legal
 “ interest of the same, from and after the first term of
 “ Whitsunday or Martinmas after my death, aye and
 “ until the same is paid ; it being provided that in the
 “ event of the death of either of the said John and
 “ Wilhelmina Johnston without lawful children the
 “ survivor shall succeed to the share of the predeceaser ;
 “ and in the event of the death of both without lawful
 “ children, the said Jane Whittet and her foresaids
 “ shall succeed to the whole of what is herein provided
 “ to them ; and in this event of the said Jane Whittet
 “ succeeding to the whole of the said 5,000*l.* provided
 “ to the said John and Wilhelmina Johnston between
 “ them she shall be bound to pay, at the Whitsunday
 “ or Martinmas after the death of the longest liver of
 “ the said John and Wilhelmina Johnston, the sum of
 “ 1,000*l.* to William Glen Johnston, their father,” &c.

These several provisions were declared to be in full to William Glen Johnston and John and Wilhelmina Johnston of all claims competent to them through the grantor's decease, and the deed contained a nomination of tutors and curators. Mr. Whittet died sometime before Whitsunday 1803, while his two grandchildren were in infancy, and his daughter, the appellant, was in minority.

In 1804 the appellant, with consent of her curators, granted an heritable bond in favour of the infant legatees, John and Wilhelmina Johnston, in corroboration of and in similar terms with her father's settlement, on which infestment followed. Again, on 6th January 1810, she, being then of age, executed a new heritable bond in favour of the grandchildren, in similar terms with the

former, which had been agreed to be renounced. This new bond, like the former, narrated Mr. Whittet's settlement, and the clauses as to the provisions to his grandchildren; and, in conformity with it, the appellant bound herself "to make payment to each of the said John " and Wilhelmina Johnston of the sum of 2,500*l.* sterling, " at the first Whitsunday or Martinmas after they " respectively have attained the age of twenty-one years " complete, with the legal interest of the same from and " after the term of Whitsunday in the year 1803, being " the first term after the death of the said John Whittet, " aye and until the said several sums become due re- " spectively, and yearly and termly thereafter until " the payment thereof, the said principal sums making " in whole to the said John and Wilhelmina Johnston " between them the sum of 5,000*l.* sterling of princi- " pal; providing always, as it is hereby provided and " declared, that, in case of the death of either of the " said John and Wilhelmina Johnston without lawful " children, the survivor shall succeed to the share of " the predeceaser; and in the event of the death of both " without lawful children, I, and my heirs, executors, " and assignees, shall succeed to the whole of the said " sums," &c. This bond was followed by infetment.

Wilhelmina Johnston, while still in minority, died in July 1814, unmarried and intestate. Her brother attained majority on 19th July 1820; and on 30th December of that year, an adjustment of accounts took place between him and the appellant (now Mrs. Greig) and her husband, by which the balance due to the former, on his own and his sister's provisions, with interest, was found to amount to 7,047*l.* 3*s.* 9*d.*

On 6th February 1821 John Johnston executed a dis-

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charge of the heritable bond of 1804, in so far as related to the lands of Kinnaird, being satisfied with the sufficiency of the security afforded by the lands of Pitkindie and Ballairdie. By this deed he declared, that quoad these lands the bond should “subsist in full force and effect in the whole heads, tenor, clauses, and contents of the same in favours of me, and my heirs, executors, and successors, aye and until the said principal sum of 5,000*l.* sterling, interest and penalties, should be fully paid.”

Having resolved to visit the Continent on account of his health, he executed a factory and commission, dated 31st August 1825, in favour of Mr. Henry Johnston, with power to “uplift, receive, pursue for, and discharge, assign or convey all and sundry debts and sums of money, and others whatsoever, due and addebted to me by bond, bill, account, or in any other manner of way, compound, transact, or agree for the same, or renew the present, or take new securities for all or either of the said debts, in the same manner as I could do myself; and in particular, and without prejudice to the foresaid generality, the principal sum due by an heritable bond, of date the 6th day of January 1810 years, by Miss Jane Whittet, now spouse to Alexander Greig, esq., writer to the signet, to and in favour of me, therein designed John Johnston, and my deceased sister, Wilhelmina Johnston, for the sum of 5,000*l.* sterling.” He then fully described the debt, as in Mr. Whittet’s settlement, and gave “full power to my said commissioner to grant, execute, and deliver all requisite discharges and renunciations, assignments, receipts, or other conveyances, in relation to

“ the before specified and all other debts and sums due
“ to me.”

This factory was delivered with a holograph memorandum as to the management of his affairs, commencing thus:—“First. In regard to the debt due by Mr. and Mrs. Greig, of which 5,000*l.* is the principal sum contained in the bond, and 1,000*l.* of interest, converted into principal at the first term of Martinmas after my majority in 1820, and upon which sum of 6,000*l.* the interest has been paid up to Whitsunday 1825, at four per cent., being the agreed on rate till further intimation, Mr. Johnston will cause intimate to Mr. and Mrs. Greig, that the money must be paid up at Martinmas next; failing which term the sum of five per cent. must be paid upon the same, and if not paid is authorized to take all legal steps for re-covering the same; and beyond the term of Whitsunday 1826 it ought not to be allowed to lie.”

On 2d September of the same year, he wrote to Mr. Greig that he had executed the commission for the purposes above mentioned, and a correspondence took place, tending to prove the fact that Mr. Johnston desired to have his money paid up. During the course of it, Mr. Greig, on 16th March 1828, paid 1,000*l.* of accumulated interest, and 300*l.* of arrears. An action of mails and duties was then raised against Mr. Greig and his tenant on 25th January 1827, but before any money was recovered, accounts were received that John Johnston had died on 10th March 1826 intestate.

The appellant, Mrs. Greig, thereafter procured herself served heiress of provision in special to him as to the heritable bond of 5,000*l.*, and completed her title by a precept of clare constat and infestment. She also

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made up a title by a precept of clare constat and infeftment, as heiress of provision in special to Wilhelmina Johnston's half of the provision. Shortly afterwards the respondent George Richardson Johnston, (who was the eldest son of Mr. William Glen Johnston by a second marriage, and who was therefore brother consanguinean of John Johnston and Wilhelmina Johnston,) purchased briefes from Chancery, directed to the sheriff, for serving him nearest and lawful heir of line and of conquest in special to them; but Mr. and Mrs. Greig appeared, and objected to the services, on the ground that the fee was already full by Mrs. Greig's infeftments; and the sheriff substitute, on 26th May 1828, sustained the objection, and dismissed the claims.

George Richardson Johnston advocated the briefes, but in the meantime, took out other briefes, directed to the magistrates of Edinburgh, and obtained himself served heir of line and of conquest in general to John Johnston and Wilhelmina Johnston, and thereupon raised an action of reduction of Mrs. Greig's titles, and these processes were conjoined.

In the meantime another question arose in the following manner:—John Whittet, by his settlement, gave power to his widow to test upon 500*l.* at her pleasure. On 12th December 1814, she executed a trust deed and settlement, by which she conveyed her whole property to trustees for the purpose of being sold, with directions to lend out the proceeds, after payment of her debts and expenses, and “to take the vouchers thereof in favour of them, for the uses and purposes expressed in the present trust.” She then directed, that the funds “shall, with the accumulated interest thereon, be paid to the said John Johnston, at the first term of Martinmas

“ immediately after he shall attain the age of twenty-one
 “ years complete; but failing his surviving that term of
 “ Martinmas, or, if he should survive that term, then
 “ failing his specially disposing the same himself, I
 “ appoint, in both of these events, my said trustees to
 “ accumulate the said trust funds, adding the interest
 “ thereto annually, until the first term of Whitsunday or
 “ Martinmas after the children already born, or who shall
 “ be born, of my daughter, the said Jane Whittet, shall
 “ all attain the age of twenty-one years complete, and
 “ then to pay the said trust funds and accumulated
 “ interest to such of them as shall be alive at that term,
 “ equally, share and share alike; and should only one
 “ survive, to pay the whole to him or her.”

The trustees were appointed tutors and curators to John Johnston and to the children of the appellant, in so far as concerned the provisions, and also to be the sole executors. The widow died on 24th October 1821, being upwards of a year after John Johnston had become major. Her estate was entirely moveable, and consisted partly of a debt, specially conveyed, due by Mr. John Miller. An inventory of the estate was given up by one of the trustees, in which that debt was included. In the above factory granted by John Johnston, this debt was mentioned in the following terms, as one which his factor was empowered to recover:—“ Also the sum of
 “ 468*l.* 16*s.* 9*d.* due to me by open account, by John
 “ Miller, esquire, Lincoln’s Inn, London, conform to
 “ the state thereof annexed to his letter to me, dated
 “ 2d of January 1824, together with whole interest
 “ due, or which may become due thereon in time
 “ coming.”

In the holograph note of instructions which he de-

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livered to his factor, he referred to the same debt in the following terms:—" 5. As to the debt due by Mr. Miller, London, instructions have been given to John and James Miller, writers in Perth, to correspond with him on the subject."

The factor received payment, on 21st November 1825, from Mr. Miller, of 511*l.* 5*s.* 7*d.*, being the amount of the debt, with interest. John Johnston gave no other special instructions as to the disposal of this money; but, by his note of instructions, he authorized the factor (without saying from what fund) to pay two bills of 300*l.* and 200*l.* which he had signed for Mr. Glen Johnston, his father, on receiving a bond and disposition in security for the amount. The factor applied the money received from Mr. Miller in payment of these two bills; and for repayment of the amount, he took from Mr. Glen Johnston an heritable bond payable to John Johnston, "and his heirs and assignees whomsoever."

The debt which had thus been due by Mr. Miller was now claimed by Mr. and Mrs. Greig, for behoof of their children, as substitutes under Mrs. Whittet's deed, and by Mr. Glen Johnston for behoof of his younger children of the second marriage, as executors of John Johnston, their brother consanguinean. To try this question, and also to try the question of right to the 1,300*l.*, of which the factor had received payment from Mr. Greig, and which was claimed by Mr. Glen Johnston's younger children, and also by Mr. and Mrs. Greig, the factor raised a process of multiplepinding and exoneration, which was conjoined with the other processes. They were reported on cases to the First Division of Court, who being equally divided in opinion the follow

ing queries were sent to the other Judges: — “ 1.
 “ Whether, by virtue of the deed of settlement executed
 “ by old Mr. John Whittet, dated 12th May 1802, in
 “ relation to the provision of 5,000*l.* now in dispute
 “ between these parties, Mrs. Greig is entitled to suc-
 “ ceed to it under the substitution or destination in her
 “ favour? Or, whether the settlement is to be con-
 “ sidered as a conditional institution, and that, as John
 “ Johnston survived the term of payment, and died with-
 “ out issue, the succession opened to his own heirs and
 “ representatives? 2. Whatever would have been the
 “ right of succession, if the provision of 5,000*l.* had
 “ vested on old Whittet’s settlement, whether the con-
 “ duct of John Johnston, in regard to the heritable
 “ bond taken to him by his tutors for said 5,000*l.*
 “ operated as a confirmation of the destination therein
 “ contained in favour of Mrs. Greig? 3. Supposing
 “ John Johnston to have thereby adopted and confirmed
 “ the destination in favour of Mrs. Greig, whether his
 “ subsequent conduct and instructions to his factor, on
 “ the eve of his going abroad, and the conduct and
 “ proceedings of his factor and agent, and also the
 “ conduct and proceedings of Mr. and Mrs. Greig,
 “ operated as an extinction of said destination, so as
 “ to open the succession to the 5,000*l.* to his own heirs
 “ and representatives? 4. Whether, in all the circum-
 “ stances of the case, the right to the 5,000*l.* in dispute
 “ belonged, upon John Johnston’s death, to his legal
 “ representatives, or to Mrs. Greig? Whether, by the
 “ trust deed and settlement of Mrs. Whittet, dated 12th
 “ December 1814, and the subsequent proceedings
 “ thereto, the sum of 300*l.* &c. ought to be laid out for
 “ behalf of Mrs. Greig’s children till they shall come of

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“ age, and to be then divided between them? Or,
 “ whether said sum now belongs, or ought to be paid, to
 “ the heirs and representatives of John Johnston?”

On considering the questions remitted to them, the consulted Judges gave opinions*, and the Court pronounced this interlocutor on 28th June 1831:—“ The
 “ Lords having resumed consideration of the revised
 “ cases for the parties, with the record, and whole process, together with the opinions of the other Judges,
 “ they, in the reduction and declarator, reduce, decern,
 “ find, and declare in terms of the conclusions of the libel; in the advocacy, remit to Lord Corehouse,
 “ the Ordinary in the case, to advocate the briefes, to alter the interlocutor of the sheriff, and to remit to
 “ the junior permanent Lord Ordinary to be Judge in the services, and to proceed with the same; in the
 “ multiplepoiniding and exoneration, rank and prefer George Richardson Johnston, James Charles Johnston,
 “ ston, Charles Richardson Johnston, David Johnston, Thomas Glen Johnston, Henry Johnston, John Richardson Johnston, Georgina Johnston, and Harriet Johnston†, upon the funds in medio, in terms of their
 “ respective claims and interest, and decern in the preference and against the raiser; and upon his
 “ accounting for or paying the said funds in medio to them, exoner and discharge him in terms of the libel;
 “ but reserving all questions of preference or division between the pursuer, advocator, and claimants before
 “ named, inter se, and decern; further, find no expenses due to either party.”

Mrs. Greig appealed.

* See these Opinions, 9 S. D. B. 806.

† Children of Mr. Glen Johnstone.

Appellants.—By virtue of the substitution contained in Mr. Whittet's deed of settlement, and renewed in the subsequent securities, the appellant, Mrs. Greig, in consequence of both Wilhelmina and John Johnston dying without lawful children, succeeded to the provision of 5,000*l.* By the acts which John Johnston performed, after he became of age, and more especially by the discharge and renunciation of 6th February 1821, he not only homologated the deed of settlement, but plainly evinced his knowledge that the substitution in Mrs. Greig's favour still subsisted, as well as his desire that it should continue effectual. It was therefore incompetent for the respondent George Richardson Johnston to obtain a service either as heir of Wilhelmina Johnston, or as heir of John Johnston.

Again, by virtue of the substitution contained in Mrs. Whittet's trust disposition and deed of settlement, as John Johnston died without having "specially disposed" the trust funds, the whole of these funds fall to be accumulated till the first Whitsunday or Martinmas after Mrs. Greig's youngest child shall attain majority, and to be then equally divided among her surviving children.*

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* *Binning v. Creditors of Auchencbreck*, 15th Dec. 1749, Mor. 6337; *Omey v. M'Larty*, 19th Nov. 1788, Mor. 6340; Ersk. ii. 3, 49; Ersk. ii. 2, 14., 1. 7, 39; Sir Geo. Mackenzie, iii. 8, 20; Stair, iii. 5, 51; Ersk. iii. 8, 44; *Campbell v. Campbell and Macmillan*, 12th June 1740, Mor. 14855; *Craigie & Stewart's Rep.* i. p. 2. p. 343; *Fowke v. Duncans*, 1st March 1770, Mor. 8092; Ersk. iii. 8, 47; *Bruce v. Bruce*, 2d June 1829, Shaw and Dunlop, vii. p. 692; Ersk. ii. 2, 16. iii. 9, 9; *Cuningshams v. Glen*, 27th Feb. 1812, F. C.; Ersk. ii. 9, 64, 66; Bell, 4th edit. v. ii. p. 6. sect. 3, 4; *Binning*, 21st Jan. 1767, Mor. 13,047; *Wood*, 26th June 1789, Mor. 13,043; *Magistrates of Montrose*, 21st Nov. 1738, Mor. 6398; *Wallace*, 28th Jan. 1807, Mor. No. 6, App. v. Clause; *Baillies*, 4th June 1822, F. C.; Ersk. iii. 9, 6., ii. 2, 6, 9., iii. 8, 20; *Stewart's Answers to Dirleton's Doubts*, 2d edit. p. 20. Ersk. iii. 9, 6; *Fleming*, 6th June 1798, Mor. p. 8111; Ersk. iii. 8, 20; *Stewart's Answers*, p. 25; *Stair*, iii. 3, 22; *Evan's Trans. of Pothier*, Ob. p. 2. c. 3. t. 1. sec. 3. foot note; Ersk. iii. 9, 14.

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Respondents.—The right to the 5,000*l.* vested absolutely in John Johnston, upon his attaining majority, and thenceforth the declaration as to that right eventually devolving upon Mrs. Greig, became ineffectual. Even although the contingent destination had been a substitution, such substitution would have been revoked or extinguished by the acts of John Johnston and his factor, after he had attained majority. Requisitions for payment were made upon Mr. and Mrs. Greig by John Johnston, and they cannot be allowed to found upon their own failure to pay these sums, in terms of their obligation, in order to defeat the rights of his representatives. In like manner the provisions under the deed of Mrs. Whittet vested in John Johnston, and now belong to his legal representatives.*

LORD CHANCELLOR.—My Lords, this case, which has been argued with very great learning on both sides, is one which has been considered important in the Court below, both as regards the amount of property and as regards the principle of law involved. My Lords, I do not intend at present to urge your Lordships to come to a final decision on this question, but I shall state the

* Oswald, 18th June 1680, Mor. Dic. 2948; Ballantyne, Dec. 1687, Mor. 2953; Watt, 8th Dec. 1702, Mor. 2954; Lord Reyston, 16th Feb. 1715, Mor. 2955; Drummond, 7th July 1738, Mor. 3002; Primrose, 26th Feb. 1754, Mor. 3002; Mitchelson, 15th Nov. 1820, F. C.; Hamilton, 8th Dec. 1687, Mor. 14,850 and 6346; Smith, 14th Dec. 1710; Denholm, Jan. 1726; Brown v. Coventry, 2d June 1792; Bell's Cases; Ersk. iii. 8, 44, note, 465; Haldane, 15th Feb. 1753, Mor. 3308; Blair, 9th Feb. 1742; Brown's Sup. vol. v. p. 718; Inst. de Legat, l. 2, f. 20, sect. 21; De Reg. Jur. l. 161; Ersk. iii. 3, 85., iii. 9, 9; Hutchison v. Drummond, 20th Jan. 1697, Mor. 2995; Ersk. iii. 3, 9; Douglas, Heron, and Company v. Reddich, 1st March 1793, affirmed, Mor. 11,045; Stair, iii. 2, 53; Bank. i. 519, sec. 127; Ersk. ii. 3, 49.

view which I at present take of the main question of law—I mean that respecting the substitutional condition, whether the words in question make out the conditional institution or the substitution; and I shall state to your Lordships very shortly why I wish to have a little further opportunity of considering one or two of the cases which bear upon that point. My own opinion undoubtedly is, that the principle of law laid down in *Brown v. Coventry**, as applicable to this case, is clearly established by that decision as the general rule of the law of Scotland on these questions, and may be reconciled with the principle laid down in the other cases. Upon the former of those questions I entertain little or no doubt; it is upon the latter—the possibility of reconciling *Brown v. Coventry* with the other cases, particularly the case of *Campbell v. Campbell*†—it is on this that I wish to have further time.

My Lords, I take it there hardly ever was a case which underwent more full discussion than the case of *Brown v. Coventry*. It appears to have excited great attention among the Judges of the Court below; they seem to have felt that the law at the time was not a little fluctuating, not fixed upon such a steady and secure basis as might have been desirable; and they therefore applied themselves to the consideration of the question with an attention proportioned to the importance of the principle of law involved in it, and to their feeling of the necessity that this principle should be finally settled. Those Judges were men of the greatest learning and ability that at any period ever

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† 12th June 1740, Mor. 14,855, Cr. & St. p. 343.

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adorned the Scottish bench. The Lord Justice Clerk Braxfield, and Lord Eskgrove, very eminent lawyers of great experience in Scotch law,—those and the other learned Judges applied themselves in disposing of that question, and I find that they and their brethren gave an unanimous decision upon the subject; one of them expressing a hope that now the question might be held to be ultimately decided, and never be contested. Now, what is the rule to be extracted from the decision in that case? Taking the opinions of all the learned Judges, and the arguments and reasons on which they are supported, I consider the rule to be this,—that though true it is by the Scotch law you may provide a substitution in personal estate—though true it is you may provide, what the Roman law prohibited you from doing, for the heir of an heir—yet in every case of doubt the presumption is not only strong, but overruling, against the substitution, and in favour of the conditional institution; not that any express form of words is necessary to create a substitution—not that there is any technical form of expression which shall alone amount to a valid declaration of the intention of the party disposing of his property to exclude conditional institution, and to provide substitution—but that, taking the words which he uses, and taking, as in every other case, the whole instrument together, and, according to the ordinary and sound rule of construction, to give each part its meaning from a view of the whole taken together, you are to discover so plainly, so undeniably, so undisputably, the meaning of the party to make substitution, as leaves you no room for doubt; and in that case only, you have a right to say that he has created a substitution touching the personal estate. If, then, the

words which he uses are capable of either sense,—if the whole of the disposition is so framed that it may be applicable either to the one or to the other,—I take the rule in the case of *Brown v. Coventry* to be, that you are to construe it as a conditional institution, and not a substitution. In short, it must be exclusive—the instrument must be such as to exclude conditional institution before you can say that the substitution has been validly constituted.

Now, I have stated to your Lordships that there is some doubt remaining in my mind how far this principle,—that is, how far the case of *Brown v. Coventry* is reconcilable with the earlier case of *Campbell v. Campbell*. Undoubtedly it would be a painful alternative to be reduced to ask your Lordships to depart from one of those precedents, or from the other, because both of the decisions rest upon very high authority; one of them, indeed, upon an affirmance of the judgment of the Court below, pronounced in this House, and pronounced at a time when your Lordships were advised by no less a Judge than Lord Eldon. Nevertheless, supposing it to be found impossible to reconcile these two cases, it is not to be doubted that *Brown v. Coventry* has uniformly been held to be law,—that the very Judges against whose argument the authority in that case might be adduced in the present admit, explicitly admit, its weight; and one of those learned Judges describes it as a decision not now to be questioned, and as having for forty years past regulated the conduct of the King's subjects in Scotland and their advisers. It would be vexatious indeed, then, were we forced to make the authority of such a decision bend before the earlier case of *Campbell v. Campbell*. But I am by no means clear

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that the two cases are irreconcilable. It appears to have been the opinion of my Lord President Campbell that they are not so. I may take it, again, to have been the general opinion of the learned Judges who decided the latter of the two cases that they were not irreconcilable, for *Campbell v. Campbell* was distinctly pressed upon the Court in the argument of *Brown v. Coventry*. It was dealt with by, I think, more than one of the learned Judges, but explicitly by Lord President Campbell; and he endeavoured to distinguish the two by a view of the circumstances of the earlier case, and by contrasting them with the case then at the bar—I mean *Brown v. Coventry*. Whether or not the reasons which appear in the printed case here to have been the foundation of the argument at your Lordships bar are consistent altogether with the distinction taken by the Lord President Campbell to which I have just referred, and whether or not the report of Lord Kilkerran in that case, which goes upon somewhat different reasons from those stated in the printed appeal case—whether or not that fuller report of the reasons of the Court below is also reconcilable with the distinction taken by Lord President Campbell, and upon which he differs in the second case,—I will not now stop to inquire. These are among the matters which I wish to have an opportunity of investigating before I finally dispose of this case. Lord President Campbell seems to have thrown some doubt upon the authority of *Campbell v. Campbell*; he does not state it so strongly as the note of Kilkerran states with respect to the other case, that of *Christie* in the year 1681, nor does he state it so strongly as he himself states the case of *Lane v. Nichol*; he does not state that that is not law, but throws very con-

siderable doubt, sufficient doubt to give one a strong inclination to believe that his Lordship was not quite satisfied with the decision of *Campbell v. Campbell*; for I think the last remark he makes upon it is, that it does not appear clearly upon what ground the money was given. Be that as it may, those are among the points that I wish to have an opportunity of looking further into, and I think it is very possible that the two cases may be found to be reconcileable. As at present advised, undoubtedly, on the first point, my opinion goes with the Court below, considering the principle to be established in the case of *Brown v. Coventry*; and that in the present case there is no distinctive intention shown to provide a substitution—that there is nothing here which excludes much more than the possibility of a conditional institution; that upon the whole, therefore, I agree with the learned Judges in the Court below in holding it to be a conditional institution. I will not trouble your Lordships with the grounds of that opinion further than to state, that my opinion upon this, and the reasons of that opinion, are most distinctly expressed in the earlier part of the opinion of one of the learned consulted Judges, Lord Cringletie. My Lords, on the other points I shall not trouble your Lordships with any observations. Upon the last point as to the 511*l*., I have no doubt whatever, and I feel no hesitation in agreeing with the learned Judges in the Court below. The only ground on which I wish your Lordships to favour me with time further to consider this question is that which I have stated.

LORD WYNFORD.—My Lords, it is not my intention, after what has been said by my noble and learned friend, to press your Lordships for an immediate deci-

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sion; but I confess to your Lordships that my mind is made up upon another point, giving the go-by to the point upon which my noble and learned friend has addressed you with so much ability. I am prepared humbly to submit to your Lordships that the judgment of the Court below ought to be affirmed. But, my Lords, upon the first point, after what my noble and learned friend has said, I will not venture to deal with that opinion, but will only state what my present impression is. If we had merely to look at the instrument itself, I think that none of us should have any doubt that the instant these parties became of age, it, in the language of the law, became a vested interest, and belonged to that party. My Lords, it happens that too much light is apt to dazzle the eye; and I think, upon questions of this sort, too much learning is very much apt to puzzle that which is in itself perfectly clear. My Lords, if you look at the words of this instrument, I think no individual at this time of day would doubt. I am quite sure, on the construction of instruments, pretty much the same rule pervades in one part of the island as the other. The words are these:—"With and under the burdens and provisions therein specified, and particularly with the burden of paying to each of my two granchildren, viz. me the said John Whittet Johnston, therein designed John Johnston, and Wilhelmina Johnston my sister, the sum of 2,500*l.* sterling, at the first Whitsunday or Martinmas after we had respectively attained the age of twenty-one years complete, with the legal interest of the same from and after his death, aye and until the same was paid; it being provided that, in the event of the death of either of us without lawful children, the survivor should succeed

“ to the share of the predeceaser ; and in the event of
 “ the death of us both without lawful children, she
 “ the said Jane Whittet, and her heirs, executors, and
 “ assignees, should succeed to the whole of what was
 “ therein provided to us.” Now I should think it
 perfectly clear, if it were not for the conflicting deci-
 sions, that that means “ should die previous to her attain-
 “ ing the age of twenty-one ;” but undoubtedly, as my
 noble and learned friend has stated, that case of Camp-
 bell v. Campbell would lead one to a contrary conclu-
 sion. It is impossible to forget the high authority by
 which that case was decided. I think at this time
 of day we have not very clearly before us the
 manner in which that case was argued before this
 House ; but it does seem to me, I confess, notwithstand-
 ing the high authority by which it was decided, to be
 a most extraordinary decision ; but that principle which
 we act upon, I believe, in both parts of the island,—
 namely, that the intention is to govern—is the true
 principle. Here a young man comes from the East
 Indies—his father is an old man in Scotland—he
 supposes his father to be dead ; and what does he do ?
 He says, “ If, contrary to my idea upon the subject, my
 “ old father should be dead, that it may not be a
 “ lapsed legacy I give it to my daughter.” It is quite
 clear what he meant ; that if his father was alive, his
 father should take it absolutely ; but that if the father was
 dead, in order to prevent a lapsed legacy, it should go
 to the daughter. I say, if that case is good law, it is
 very difficult to distinguish it from the present. That
 case was under the consideration of the Court in the
 case of Brown v. Coventry, which case appears to have
 been sanctioned by this House, and appears to have

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been sanctioned by the general approval of the Scotch bar from the time it was pronounced down to the present time. According to that case, the principles upon which that case was decided are very clearly and distinctly stated; the distinction was made between real and personal property; real property in Scotland is governed by the feudal law and custom of Scotland; personal property in Scotland is governed by a different law, namely, by the Roman law; they proceed accordingly in that case; they say, if it was real property, you are to presume it was the intention of the party to grant what is called a substitution; if personal property, it is to be presumed to be the intention of the party to give an immediate and complete interest in it at once; and unless there are words so strong as to leave no doubt, personal property, though real property, would be settled in this manner, personal property remains unfettered at the disposal of the party. This appears to me a clear, plain, rational principle, that cannot be departed from without producing great prejudice to the people of Scotland under the administration of justice. But, my Lords, I confess, though I doubted about these points for some time in consequence of those conflicting cases, I am still not desirous of finally deciding the matter, though I think it would be difficult for me to bring myself to form any other opinion than that which I have now expressed. The ground which struck me before I heard the argument of the counsel for the respondents, on which I think this judgment ought to be maintained, is, that this man Johnston did get the complete possession and dominion of this property, and that therefore there is an end of the entail. My Lords, I do not put it upon the instru-

ment that was executed, for I agree with the Judges in the Court of Scotland that that could have no effect with respect to the entail—that which took place during the minority of Johnston. But when Johnston came of age, what does he do? When he is of age he executes a deed, which the other party accepts; therefore it is a deed between both parties, by which the security is confirmed upon the estates in Scotland, he taking all the benefit of the security which these different estates gives him, but certainly giving a different destination to the property secured; for in the clause of that instrument it is distinctly stated, that from that time this property is to be considered for the benefit of him, his heirs, executors, and successors. Now, Mr. Murray cited to your Lordships two cases. It appears to me that it did not want the authority of any case whatever; but if it did, those two cases have completely decided it, as I think. It appears to me, that where the word “heirs” is used in any instrument, unless there are other words to show that that does not mean heirs of line, it ought to be taken to mean heirs of line; but if there be any doubt about the word heirs, there is the word “executors.” Now, with respect to the word “executors,” it appears to me that it is impossible to put any other construction upon that than that it must mean a gift of the property; the destination is, that it is to go to his executors, and not the executors of any other person—not the persons who take as executors under any other deeds. But if it were possible to entertain any doubt on this point, the two cases of Douglas, and a name which does not immediately occur to me, nor is it necessary to mention it, completely settle that point. By those two cases it was decided by the high

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authority of this House, that if the word "heirs" be mentioned it must mean "heirs of line," unless the contrary be shown by some words that are to be found in some instrument, either in the instrument itself, or some instrument connected with and controlling the instrument itself. In that case it was proposed to offer parole testimony. I was a good deal surprised that an attempt should be made here to control any instrument at the bar of this House by parol testimony. The House, however, in that case rejected the parol testimony, and decided that, according to the words of the instrument, it was to be taken as heirs of line. Then if it is to be taken as heirs of line, has not a different destination been given to this property? Is it possible to consider, subsequent to this, that this money was not as completely reduced into the possession of this party as if it had actually found its way into the pocket of the person entitled, and been by him, after it had been so found in his pocket, applied to different purposes? Getting rid, therefore, of all doubt and difficulty on the other point, I have no hesitation in saying I agree with Lord Cringletie, who has given an excellent judgment on this part of the case; and though the other Judges do not speak upon it, his judgment is confirmed by the judgments of the other Judges, that this is such an alteration of the destination as destroys the deed.

Adjourned.

LORD CHANCELLOR.—My Lords, there are several cases which now stand for the decision of your Lordships, the first of which is that of Whittet v. Johnston, a case of great importance in point of amount, as well as in respect of the principle it involved, and on which the learned Judges in the Court below were somewhat divided in

their opinion; the Judges in the First Division of the Court of Session having been equally divided in opinion, the learned Judges of the Second Division and the permanent Lords Ordinary were consulted. The questions were considered by them, and ultimately judgment was given that it was only a conditional institution. My Lords, this case was very fully argued at the bar; and after the argument some observations were addressed to your Lordships by my noble and learned friend, whose assistance your Lordships had when the question was considered, and also by myself, and it stood over for further consideration, with a desire, if possible, to reconcile the principle of the judgment in this case and also the principle of the judgment in another case in which a question of the same description arose,—*Brown v. Coventry*, in 1792, with the case of *Campbell v. Campbell*, decided in the Court of Session as far back as nearly a century ago, namely, in 1740, and afterwards affirmed on appeal by your Lordships. That was a case most gravely considered; and I was desirous of being enabled to see that there was no discrepancy between the rules which governed the decision in the Court below as well as here in that case, and the principles upon which the case of *Brown v. Coventry* depended. That case was argued very much upon the principles of the English law. My Lords, I do not mean to say that all the difficulty I felt is entirely removed; the further consideration of the cases has not enabled me to say that I can satisfactorily get over the difficulty which then occurred to me, and to see the principles on which the Court proceeded so clearly as I could wish; nevertheless, as I stated before, it is some satisfaction to me to know that the case of *Campbell v. Campbell* was not

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passed over in disposing of this question in *Brown v. Coventry*; on the contrary, it was distinctly before the Court, and it is distinctly referred to in the judgment of one of the learned Judges, Sir Ilay Campbell, in the course of his observations on that case. Ever since the year 1792 *Brown v. Coventry* has been the law of the Court, and I know no instance in which it has ever been called in question. I am therefore of the opinion, which I held when I last addressed your Lordships upon this subject, that, notwithstanding the apparent difference to which I then adverted, your Lordships must proceed on that case. The circumstances are not precisely the same; still it is difficult, but I do not say it is impossible, to reconcile them. If, however, there may be considered to be some difference in the principle, admitting for the moment the law to have been somewhat changed, I am not, under the circumstances, prepared to advise the House to go back to the antecedent case of *Campbell v. Campbell*. Having entered fully into the case on the former occasion, I will now only move your Lordships to affirm this judgment.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House; and that the interlocutors, so far as therein complained of, be and the same are hereby affirmed.

RICHARDSON and CONNEL — ALEXANDER DOBIE,
Solicitors.

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JOHN DIXON and WILLIAM DIXON, Appellants.— No.29.
Dr. Lushington—Murray.

JOHN FISHER and others, Respondents.—*Lord Advocate*
—Solicitor General.

*Testament—Condition—Provisions to Wives and Children—
 Parent and Child—Legitim.*—A father bequeathed a
 provision to his daughter in life-rent, and her children
 in fee, declaring that the provision should be in full of
 all that his daughter could claim from his estate—Held,
 (affirming the judgment of the Court of Session,) that
 the right of the children to the fee was not affected by
 the daughter repudiating the provision, and betaking
 herself to her legal claims.

BY a disposition and settlement, dated 11th April 1817, and a codicil thereto, dated 15th March 1820, William Dixon disposed of all his heritable and moveable estate, in the following terms :—

“ I William Dixon, lately residing at Govanhill near
 “ Glasgow, now of Calder Iron Works, being resolved
 “ to make a settlement of my affairs to take place in
 “ the event of my death, in order that all disputes and
 “ differences with regard to my property may be
 “ avoided ; and considering that I have already in part
 “ provided for my wife by a separate life-rent deed

2D DIVISION.

Lord Fullerton.

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“ executed by me in her favour, which provision so
 “ made is hereby ratified and approved of, and which
 “ with the additional provision after mentioned is
 “ hereby declared to be in full to her of all that she can
 “ ask or claim in and through my decease, and it is
 “ therefore now necessary that I shall provide for my
 “ children, which I have resolved to do in manner un-
 “ derwritten. Therefore I hereby give, grant, assign,
 “ convey, and dispoise to and in favour of John Dixon
 “ and William Dixon, my two sons, and their lawful
 “ issue, and failing either of my said sons to the survi-
 “ vor of them and his lawful issue, all lands, heritages,
 “ leases, minerals, adjudications, teinds, and heritages of
 “ every description or denomination, as also all debts
 “ and sums of money, whether heritable or moveable,
 “ interest thereof, rents of lands or minerals, stock in
 “ trade, or in any company or society, public or private,
 “ and dividends or profits thereof, stock of farms, stock
 “ of minerals, and every other species of property, real
 “ or personal, connected with any work, farm, or un-
 “ dertaking with which I may be connected, concerned,
 “ or employed in at the period of my death; as also
 “ all cash, goods, gear, and effects of every denomina-
 “ tion, including heirship moveables, presently belonging
 “ or which shall be appertaining, resting, or owing to
 “ me at the time of my decease; excepting my household
 “ furniture and plate, which is to belong to my wife if
 “ she survive me; with all and sundry writs, title deeds,
 “ leases, bonds, heritable and moveable, promissory
 “ notes, bills, accounts, account books, transfers of stock,
 “ and other writs, and grounds and instructions of the
 “ said subjects and funds before conveyed, with all
 “ action, diligence, and execution competent or that

“ may be competent, and all that has followed or may
 “ be competent to follow on the premises, dispensing
 “ with the generality hereof, and declaring these presents
 “ to be as good and effectual to all intents and pur-
 “ poses as if every particular sum and subject above
 “ conveyed were herein specially enumerated; and
 “ declaring that any list or inventory of the said debts
 “ and funds, to be signed by me as relative hereto, shall
 “ be considered as part hereof, so as to exclude the
 “ necessity of confirmation. Declaring always, that
 “ where any leases are held by me and not assignable,
 “ that such leases shall devolve to my heir-at-law, who
 “ shall be bound to impute the value thereof, as the
 “ same shall be ascertained by arbiters, to be mutually
 “ appointed by him and his brother, in part and to
 “ account of his share of my said succession. And in
 “ the event of both or either of my said sons wishing to
 “ have my said property divided, or to possess any part
 “ thereof for his own separate behoof, the same shall be
 “ valued by arbiters, to be by them mutually named,
 “ with power to appoint an oversman in case of dif-
 “ ference; and who shall also, in case of any one subject
 “ or article being elected by both my said sons, be
 “ entitled to fix who shall be entitled thereto; and said
 “ arbiters or oversman shall also be entitled to fix the
 “ periods of payment thereof, and the same shall impute
 “ in part and to account of their shares accordingly,
 “ subject always to a rateable part of the burdens and
 “ provisions after mentioned. And further declaring,
 “ that these presents are granted and shall be accepted
 “ of by my said sons and their foresaids under the fol-
 “ lowing burdens and conditions, viz.:—in the first
 “ place, for payment of my death-bed and funeral

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“ expences, and of all just and lawful debts that shall
 “ be due by me at the period of my decease, and of all
 “ gifts, legacies, and provisions which I shall think
 “ proper to leave and bequeath by any deed or writing
 “ under my hand: in the second place, under payment
 “ to each of my daughters who shall be in life at my
 “ death, or the lawful issue of such of them as may
 “ predecease me, as coming in right of their mother
 “ deceased, of the sum of 2,000*l.* sterling; the said
 “ provisions to bear interest from the first term of
 “ Whitsunday or Martinmas after my decease, but the
 “ principal sum not to be payable till two years there-
 “ after. Declaring, however, that the provision conceived
 “ in favour of my daughter Janet by her contract of
 “ marriage shall be payable in terms thereof; and
 “ when the same is paid it shall be held to be in full
 “ of her provision, and of all that she, her husband, or
 “ children can ask or claim by and through my decease.
 “ And further declaring, that the provisions to my said
 “ other daughters shall not be subject to the *jus mariti*
 “ or right of administration of their husbands, or liable
 “ to be attached for their debts or deeds, but shall
 “ belong exclusively to my said daughters in life-rent for
 “ their life-rent use *allienarly*, and to their children in
 “ fee, and shall be so secured at the sight of my said
 “ sons or the survivor of them: and in the third
 “ place, for payment of the sum of 1,000*l.* sterling to
 “ my wife, in case she survive me six months after my
 “ death, over and above the other provisions conceived
 “ by me in her favour by separate deed as before men-
 “ tioned; the said sum to bear interest from the foresaid
 “ term of payment until actually paid. And I hereby
 “ declare, that the provisions above mentioned shall be

“ in full to each of my daughters, their husbands,
 “ children, or assignees, of all that they could ask or
 “ claim in and through my decease, legally or conven-
 “ tionally, or any other manner of way. Moreover, I
 “ hereby nominate and appoint my said two sons, John
 “ Dixon and William Dixon, and the survivor of them,
 “ and their foresaids, to be my executors, universal
 “ legators, and intromittors with my whole means and
 “ estate, excluding hereby and debarring all others
 “ from these offices, with power to my said executors to
 “ give up an inventory and confirm all or any part of
 “ my said moveable estate. And I hereby recall all
 “ former settlements, reserving always to myself the full
 “ power and enjoyment of my said means and effects
 “ during my lifetime, with power to me at any time of
 “ my life or even on death-bed not only to sell and
 “ dispose of the whole premises, or any part thereof, or
 “ to burden and affect the same with debts, gifts,
 “ legacies, and provisions at pleasure, but also to re-
 “ voke, alter, or innovate these presents in whole or in
 “ part, and declaring that in so far as the same shall
 “ not be so revoked, altered, or innovated, by a writing
 “ under my hand, in so far shall the same remain good
 “ and effectual to all intents and purposes, although
 “ found lying by me, or in the custody of any other
 “ person, undelivered at the time of my death, with the
 “ delivery whereof I have dispensed, and hereby dis-
 “ pense for ever.”

Codicil.—“ I, the before-designed William Dixon,
 “ considering that by the blessing of Providence my
 “ worldly affairs have continued to prosper, whereby I
 “ am enabled and feel it to be my duty to enlarge the
 “ provisions to my daughters; therefore, and for the

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“ love and favour which I bear to them, I hereby direct
“ my said sons or survivor, as my general disponees
“ and executors, to content and pay to each of my said
“ daughters in life, and the lawful issue of such of them
“ as have or may predecease me leaving issue as in
“ right of their parent, the further and additional sum
“ of 2,000*l.* sterling, which shall bear interest and be
“ payable in like manner as specified in the foregoing
“ settlement in regard to the former provisions con-
“ ceived in their favour; and declaring that the said
“ present, like the former provision, shall not be subject
“ to the *jus mariti*, debts, deeds, curatory, or administra-
“ tions of any husbands whom my said daughters have
“ or may marry; but shall, along with the said provisions,
“ be lent out and secured on good security, at the sight
“ and in name of my said sons or survivor, along with
“ Mr. Nathaniel Stevenson, writer in Glasgow, as
“ trustees for the use and behoof of my said daughters
“ in life-rent *allennarly*, and their children in fee; the
“ fee being to be divisible among the children by any
“ joint deed of the parents or the survivor; and failing
“ such writing being executed, to be divided among the
“ children equally and proportionally, share and share
“ alike. Declaring that such of my said daughters as
“ shall not be married or have children shall notwith-
“ standing have right to dispose of by will or settlement
“ the one half of their total provision; but on failure
“ so to test, the same, along with the other half, shall
“ devolve to their surviving brothers and sisters, includ-
“ ing the issue of such of them as have deceased for
“ their parents share, equally and proportionally. And
“ further declaring, that in the event of the decease of
“ my said son William Dixon without leaving lawful

“ issue, and without disposing of his share of my said
 “ means and effects, whereby a great succession would
 “ devolve upon my said son John, I hereby direct and
 “ appoint that the said John Dixon shall in that event
 “ be bound to account for and pay to his sisters, in-
 “ cluding the children of such of them as have deceased,
 “ in right of their parents, the just and equal one half
 “ of the succession which may devolve to him by the
 “ predecease of his said brother in the event aforesaid,
 “ and that at the terms, and with interest, and to be
 “ settled and secured for them and their children, ex-
 “ clusive of their husbands’ *jus mariti* or right of
 “ administration, all as before mentioned, and equally
 “ and proportionally, share and share alike, including
 “ the children of such of my daughters as have or may
 “ decease leaving lawful issue, for their mother’s share
 “ as before specified. And I of new dispense with the
 “ delivery hereof, and consent to the registration of this
 “ codicil in the books and to the effect mentioned in
 “ the foregoing settlement.”

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The appellants, on the death of their father, accepted the trust, and entered into possession of the estates, in terms of the deed of settlement and of the codicil. Margaret Dixon (Mrs. Fisher), the mother of the respondents, was a daughter of the testator; and having repudiated the *liferent* provision bequeathed to her, and betaken herself to her right of *legitim*, she and her husband instituted a process of *multiplepounding* in the name of the appellants, in order that the estate of the testator might be divided among the parties according to their respective rights; and a relative process of *count and reckoning* was also instituted.

In the process of *multiplepounding* she claimed 12,000*l*.

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as the amount of her legitim; and her children, the respondents, claimed that the two provisions of 2,000*l.* should be secured to them as fiars in terms of the deed of settlement. On the other hand, the appellants contended that Mrs. Fisher could not claim her legitim without discharging the claim of her children to the fee of the provisions, or if they insisted on their right to those provisions her claim to legitim could not be sustained.

After various proceedings had taken place the Lord Ordinary ordered the appellants to consign in the Bank of Scotland the sum of 4,000*l.* sterling, with interest, or, in their option and without prejudice to the pleas of the parties, to grant and lodge in process a security therefor over their heritable estate. The money, including interest, amounting to about 5,000*l.*, was accordingly lent out, and the bond and disposition in security bore that the same “ quoad both principal and interest is granted in
“ trust, for behoof of the aforesaid Margaret Dixon
“ otherwise Fisher, and her children, and for the said
“ Daniel Fisher her husband, according to their respective rights and interests either at common law or
“ under the said deed of settlement and codicil of William Dixon the elder, or otherwise as may be determined in the action of multiplepoinding herein-before
“ recited, and subject at all times to the orders of the
“ said Lord Ordinary or of the Court, to be pronounced
“ in said process; the rights and interests, and pleas of
“ the whole parties being reserved to them entire, in
“ terms of the before-recited interlocutor.”

The Lord Ordinary ordered cases to the Court, and issued the following note :—“ The question whether, in
“ the case of a bequest by a father of a certain sum to a
“ child for his life-rent use allenary, and to the chil-

“dren of that child in fee, the declaration that the
 “bequest shall be in full of all the child’s legal claims
 “imports a condition on the compliance with which
 “the right of fee as well as that of the life-rent is
 “dependent, is one which appears to the Lord Ordinary to be attended with considerable difficulty. The
 “case of *Watt v. Ewan*, 10th July 1828, founded on
 “by the pursuers, is certainly very nearly in point, and
 “on the strength of that decision the Lord Ordinary
 “was at first inclined to give judgment in favour of
 “the pursuers; but in the present case, independently
 “of the expressions in the settlements, marking perhaps
 “more clearly the testator’s intention, there is this
 “additional distinction, that the provision is in favour
 “of the testator’s daughters in life-rent for their life-rent use allenary, and ‘their children in fee,’ while
 “in the case of *Watt v. Ewan*, the provision was, ‘in
 “‘favour of my son John and his present wife, and
 “‘longest liver of them, in life-rent, for their life-rent
 “‘use of the interest thereof, and the fee thereof to the
 “‘children procreated between them, share and share
 “‘alike;’—which expressions might perhaps be held to
 “denote a right in the wife and children of the specified
 “marriage more absolute and unconnected with the
 “rights of the father than that created by the general
 “expressions employed in Mr. Dixon’s settlement. As
 “the point is of some importance, and as the report of
 “the case *Ewan v. Watt* does not afford the means of
 “ascertaining the precise grounds upon which it was
 “decided, the Lord Ordinary has thought it most
 “advisable to order cases. The multiplepounding and
 “count and reckoning depending between the present
 “defenders and the mother of the pursuers include

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“ the whole funds of the testator ; the very sum now
 “ pursued for is lent out on security in virtue of an
 “ order made in those processes ; and the Lord Ordinary
 “ understands that the determination of the pursuers’
 “ mother to claim legitim or to accept the provisions of
 “ the settlement will depend on the result of those
 “ processes. But the question, how far the right of
 “ fee in the children is in any way conditioned on that
 “ determination, admits of being separately discussed ;
 “ and that course seems to have been sanctioned by
 “ Lord Cringletie’s interlocutor of the 26th May 1829,
 “ ‘repelling the preliminary defence that this action
 “ ‘ought to be dismissed, or remitted hoc statu to the
 “ ‘multiplepounding,’ and appointing the parties to
 “ prepare a record.”

The Second Division of the Court directed the parties
 to lay the revised cases before the other Judges, in order
 to obtain the written opinion of their Lordships, “ whe-
 “ ther the claim made on the part of the pursuers be
 “ or be not well founded.”

The Lords President, Balgray, Gillies, Craigie, Core-
 house, and Moncreiff, concurred in the following opinion:
 “ —We have carefully considered the disposition and
 “ settlement of the deceased Mr. William Dixon, dated
 “ 11th April 1817, as also the codicil thereto annexed,
 “ dated 15th March 1820.

“ By these deeds it is declared, that the provisions to
 “ his daughters shall not be subject to the jus mariti
 “ or right of administration of their husbands, or liable
 “ to be attached for their debts or deeds, ‘but shall
 “ ‘belong exclusively to my daughters in life-rent, for
 “ ‘their life-rent use alienably, and to their children in
 “ ‘fee, and shall be so secured at the sight of my said

“ ‘ sons or the survivor of them.’ Also in the codicil
 “ ‘ conferring an additional provision it is declared,
 “ ‘ That the said present, like the former provision,
 “ ‘ shall not be subject to the jus mariti, deeds, curatory,
 “ ‘ or administration of any husbands whom my said
 “ ‘ daughters have or may marry, but shall, along with
 “ ‘ the said former provision, be lent out and secured
 “ ‘ on good security, at the sight and in the name of my
 “ ‘ sons or survivor, along with Mr. Nathaniel Steven-
 “ ‘ son, writer in Glasgow, as trustees for the use and
 “ ‘ behoof of my said daughters in life-rent allenary,
 “ ‘ and their children in fee, the fee being to be divisi-
 “ ‘ ble among the children by any joint deed of the
 “ ‘ parent or the survivor.’ We consider these clauses
 “ of great importance, and we think that the grantor
 “ by these deeds created two separate and distinct
 “ estates, the one of life-rent and the other of the fee,
 “ and that these estates were in no ways dependent
 “ upon one another. We are the more inclined to be
 “ of this opinion, from the circumstance of trustees
 “ being appointed to hold the fee separately for behoof
 “ of the children, independent of the right of their
 “ parents. We therefore cannot see upon what grounds
 “ in justice the children can be deprived of the fee by
 “ any act or deed of the life-renters, who are entitled to
 “ manage their own property as they think fit, without
 “ control on the part of their children. The expressions
 “ made use of in Mr. Dixon’s settlement, and to which
 “ the defenders refer, are to be considered with great
 “ caution, particularly when direct and positive rights
 “ are created. Where the intention of a grantor is
 “ clear and explicit, the inductive cause is of little im-
 “ portance in testamentary deeds. Whatever were

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“ Mr. Dixon’s intentions in a certain event, yet, as that
 “ certainly has not taken place, without an express de-
 “ claration it cannot be maintained that the daughters,
 “ by claiming any thing due to them, either as a share
 “ of the goods in communion at their mother’s death
 “ or in the name of legitim at their father’s death, could
 “ deprive their children of a right of fee with regard
 “ to which their mother had no interest whatever but
 “ that of life-rent. If Mr. Dixon had intended to make
 “ the renunciation of those rights a condition of the
 “ grant of the fee he ought to have expressed his inten-
 “ tion in a more direct and explicit manner. Under
 “ these circumstances we conceive it to be improper for a
 “ court to extend a condition from presumed intention.
 “ In the present case we think that neither of the par-
 “ ties could make the condition of the other better or
 “ worse. Upon the whole, we incline to think that the
 “ case of *Watt v. Ewan*, decided 10th July 1826, is
 “ very nearly in point, and ought to be followed as a
 “ precedent. It may be observed that the plea of hard-
 “ ship, which has been stated on the part of the
 “ defenders, is not altogether just or correct. The
 “ grantor’s heirs will enjoy the life-rent of the grand-
 “ children’s provisions during the life of their mother,
 “ and so annually diminish the claim.”

Lord Fullerton :—“ I concur in the foregoing opinion.
 “ If the present could be viewed as a mere question
 “ of probability, very plausible reasons might perhaps
 “ be given for the supposition that the testator in-
 “ tended to make the right of fee, as well as that of
 “ life-rent, dependent on the surrender of the legitim
 “ by the daughters. But I do not think that the
 “ deeds contain words capable of supporting such an

“ intention. The effect of the deeds clearly is to
 “ create two distinct and independent rights, that of
 “ life-rent in favour of the daughters, and that of fee in
 “ favour of the children of those daughters. Then
 “ follows the declaration, ‘ that the provisions above
 “ ‘ mentioned shall be in full to each of my daughters,
 “ ‘ their husbands, children, or assignees, of all they
 “ ‘ could ask or claim in and through my decease
 “ ‘ legally or conventionally, or any other manner of
 “ ‘ way.’ Now, I conceive it would be outstepping the
 “ limits of legitimate construction to connect with the
 “ surrender of legitim not only the provisions of life-
 “ rent, created in favour of the daughters who had a right
 “ of legitim, but the provision of fee in favour of the
 “ children who had no such right, so as to raise by
 “ implication a condition affecting the bequest to the
 “ children. The question seems to be substantially the
 “ same with that raised and decided in the late case of
 “ Ewan v. Watt; and though there may be some slight
 “ difference in the expression of these deeds, I do not
 “ think that the difference is such as to warrant the
 “ application of a different principle to the present
 “ case.”

Lords Mackenzie, Medwyn, and Newton concurred in the following opinion :—“ In this case the testator
 “ declares, that the provisions are granted as ‘ provisions
 “ ‘ to my daughters, and for the love and favour which
 “ ‘ I bear to them.’ The mode adopted of providing
 “ the daughters is by giving them sums of 4,000*l.* each.
 “ These sums, to be sure, are directed to be laid out on
 “ securities for them in life-rent *allenary*, and their
 “ children *natis aut nascituris* in fee. But still the
 “ whole grants of these sums were certainly viewed as

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“ provisions on the daughters, insomuch that even in the
 “ case of any daughter predeceased it is expressly men-
 “ tioned, that the children of that daughter are to receive
 “ it ‘ as coming in place of their mother,’ and powers
 “ over the fee, at least of one half, if not of the whole,—
 “ powers of great importance,—are reserved to the
 “ daughters or their husbands. The whole of each
 “ provision is manifestly viewed as unum quid provided
 “ in favour of each daughter ; nor is there any thing
 “ absurd, but the contrary, in making provisions for
 “ daughters by a destination such as is here done, which
 “ reserves the full benefit of it for themselves and their
 “ children.

“ 2. The deed then bears, ‘ that the provisions above
 “ ‘ mentioned shall be in full to each of my said daugh-
 “ ‘ ters, their husbands, children, or assignees, of all
 “ ‘ they could ask or claim in and through my decease,
 “ ‘ legally or conventionally.’ The husbands, children,
 “ or assignees are evidently mentioned only as persons
 “ to whom the daughter’s right might pass. The sub-
 “ stance of the clause relates to daughters, that is, that
 “ these provisions were to be in full of their claims,
 “ legal and conventional. The idea of applicando ap-
 “ plicandis is admissible. The husband, children, and
 “ assignees could obviously have no right, legal or con-
 “ ventional, of their own, not derived through the
 “ daughter that was the wife, mother, or cedent. The
 “ provision then may be read as if the words had been
 “ simply, ‘ that these provisions shall be in full to my
 “ ‘ said daughters, of all they could ask or claim in and
 “ ‘ through my decease.’

“ 3. The daughter Margaret Dixon (Mrs. Fisher)
 “ refuses to give up and claims her legitim, and she

“ repudiates the provision, which she has full power to
 “ do; yet her children claim the fee of the provision,
 “ as being settled on them independently of her or her
 “ deeds. We think the answer to this claim good, that
 “ the manifest intention of the testator was that the
 “ provision as *unum quid* should have effect as a pro-
 “ vision on his daughter, and as a satisfaction of his
 “ daughter’s claim, legal or conventional, and not other-
 “ wise; and therefore, if it cannot have this effect, it
 “ cannot have effect at all. He never intended it, nor
 “ has he expressed it, as a separate independent legacy
 “ on his grandchildren. This construction, we think,
 “ is certainly agreeable to the true intention of the
 “ testator, and we are not aware of any principle by
 “ which that intention can be defeated and a result
 “ produced which the testator never intended. The
 “ case of *Ewan* does not appear to us to be one in which
 “ the circumstances were precisely similar to the present.
 “ In that case there do not appear to have been the
 “ same grounds for certainty that the provision was
 “ viewed as one provision on the child whose legitim
 “ was to be discharged, and on the want of this evi-
 “ dence of intention we believe the decision of the case
 “ must have rested. In this case we see no room for
 “ doubt on that subject.”

The Court, on resuming consideration of the case,
 with the opinions of the consulted Judges*, pronounced,
 on the 24th Nov. 1831, the following interlocutor:—

* Three of their Lordships, viz., the Lord Justice Clerk, Lord Glenlee, and Lord Cringletie, expressed opinions to the same effect as those of Lord Mackenzie, Lord Medwyn, and Lord Newton; but Lord Meadowbank agreeing with the other seven Judges who had signified their opinion that the defences should be repelled, there was thus a division among the Judges of eight to six.

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“ The Lords on the report of Lord Fullerton, having
 “ considered the revised cases for the parties and other
 “ proceedings, with the opinions of the consulted Judges,
 “ in respect of the said opinions find that the right of
 “ the pursuers, the grandchildren of the deceased Wil-
 “ liam Dixon, to the fee of the provisions in their favour
 “ in the settlements of their said grandfather will not
 “ be affectable by the repudiation by their mother,
 “ Margaret Dixon or Fisher, of her right to the life-
 “ rent of the said provisions; and with this finding
 “ remit to the Lord Ordinary to proceed further in the
 “ cause as to his Lordship shall seem just.”*

Against this interlocutor John and William Dixon
 appealed.

Appellants.—By the settlements of Mr. Dixon the
 provision made in favour of each of his daughters
 formed one estate or unum quid, notwithstanding the
 directions given by him regarding the disposal, in cer-
 tain events, of the life-rent and fee. There is a clear
 distinction between the appointment and creation of a
 legacy or estate, and the laying down rules for the
 disposal of such estate or legacy after it has been
 established or created; a distinction pretty much the
 same as that which has been employed in both parts of
 the kingdom, to settle questions with regard to the
 vesting of legacies, and by which it has been held
 that where a condition is so closely entwined in the
 dispositive or bequeathing clause, as to form an articulate
 part of it, the legacy shall not vest till the condition is
 fulfilled; though, where the legacy is first given by one

* 10 S. & D., p. 55.

clause, and the condition is afterwards adjoined by another, it will not necessarily have the same effect as in the case first supposed. The principle of law now referred to, has been repeatedly adopted in Scotland*, and also in England, where it is described by Swinburn as having been even in his time, *vexata questio*.† Taking this, therefore, for granted, the proper question is, what were the estates created by Mr. Dixon in his disposition and codicil, and whether the subsequent directions with regard to the disposal of these estates were such as could have any effect whatever upon their constitution or creation? And on this head there are a variety of considerations, which lead, by necessary inference, to the conclusion that the provision of life-rent and fee was intended by him to constitute only one estate.

The declaration in the settlement has no reference to the children of the daughters separate from that which it bears to the daughters themselves; and there is no reason for applying to the clause the maxim *applicando singula singulis*.

It was plainly the testator's intention to create only one estate for each stirps or familia, and therefore the whole must be taken as standing or falling by the option which Mrs. Fisher may choose to make as to insisting on her legal provisions, or being satisfied with the life-rent of the 4,000*l*.‡

Besides, the interlocutor is erroneous, in so far as it gives the respondents more than even they themselves

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* *Fouke v. Duncans*, March 1, 1778, Mor.8092; *Burnett v. Forbes*, Dec. 9, 1783, Mor. 8105.

† See Swinburn on Wills.

‡ *Williamson v. Cochrane*, 28th June 1829, 6 S. & D. 1035; *Ewane v. Watt*, 10th July 1828, 6 S. & D. 1125.

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can pretend they have any right to, even on the largest construction of the deed of settlement; for by succeeding ultimately, as it is to be presumed they will, to their mother's share of the legitim, they will take greatly more than their grandfather intended that they should draw from his estate, and burden his heir with larger claims than ever were in his contemplation.

Respondents.—By the deed of settlement and codicil there are created two separate and independent estates; one of life-rent in favour of Mr. Dixon's daughters, and another of fee in favour of the children of the daughters. The estate thus vested in the grandchildren is totally independent of their immediate parents, and the grandchildren are plainly direct objects of the testator's affection and regard, and there are no grounds upon which it can be held that the daughters by any voluntary act can defeat the provisions in favour of their children, and deprive the latter of the benefit conferred on them by the testator. Such generally being the nature of the provisions to the daughters and to the grandchildren, it cannot be contended that the provisions to the grandchildren, who had no claim for legitim, were made conditional upon the acceptance by the daughters of their peculiar provisions in discharge and satisfaction of the legitim to which they alone had right. It is plain from the whole course of the appellants' reasoning that their plea results in this: that it is unlikely the testator would have done what he has done in the circumstances if he had imagined that his daughters would claim their legal provisions; and therefore they maintain that this claim on the part of the daughters must vacate the provisions of the grandchildren. But in whatever way the

presumption may be thought to bear, the appellants by such a course of argument do not construe the deed, but they make a new will for the testator. They forget that it is not enough to show, even if they could show, that an event has occurred contrary to what the testator probably contemplated, and which, if he had foreseen, might have altered his dispositions. Intention clearly expressed never can be overruled upon any such ground as this. The appellants' argument is good for nothing, unless they can find words in the deed which plainly and distinctly express or necessarily imply that the circumstance of the daughters having recourse to their legitim should vacate the provisions in favour of the grandchildren; a conclusion which cannot be supported against the clear and indisputable fact, that the grandchildren's provisions are given to the exclusion of all right and interest in them on the part of their parents.*

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LORD CHANCELLOR.—When the case of *Dixons v. Fisher* was argued at your Lordships bar I proposed to stop the counsel for the respondents, conceiving it was unnecessary to call upon them. There is no doubt whatever that in this case there was considerable difficulty in the Court below upon the

* *Newlands v. Newlands*, 9th July 1794, Mor. 4289. affirmed on appeal; *Thomson v. Thomson*, 9th July 1794, Bell 72; *Allardice v. Allardice*, 25th Feb. 1795, Bell 156; *Watherstone v. Rentons*, 25th Nov. 1801, Mor. 4297; *Thomson v. Forrester*, 6 S. & D. 875, 4 W. & S. 136, affirmed; *Seton v. Seton*, 6th March 1793, Mor. 4219; *Scott v. Crombie*, 14th Feb. 1826, 4 S. & D., 454, affirmed on appeal 14th May 1827, ante, Vol. II. 550; *Mein v. Taylor's Children*, 8th June 1827, Fac. Coll. No. 96.

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construction of the will made in 1817 and the codicil dated in March 1820. I cannot say that it is a clear case, but upon a very full and anxious consideration of it I am of opinion that the judgment of the Court below is right and ought to be affirmed. I stated at the time when the counsel were at your Lordships' bar, that unless I should on further consideration feel more strongly than I at that time did the objections which they urged, to show that the Court below had not come to a right conclusion upon the construction, it would not be necessary to hear the further argument. The decision was certainly by a narrow majority, the learned Judges being very much divided in opinion; still I have come to the same conclusion, and I do not feel it to be necessary, therefore, to call upon the counsel for the respondents. That which I felt principally to require attention during the interval was the applicability of the case cited at the bar, of *Ewans v. Watt*, which had been decided a short time before. My Lords, that there may not be some difference between the two cases I am not prepared to say, but I see some of the learned Judges have been of opinion that the difference is much wider than I am at all disposed to think. I am of opinion, with the majority of the learned Judges, that there is a similarity between the two cases; that they are sufficiently near to make the one an authority in dealing with the other; and being of opinion, on a further consideration of this case, that there is not sufficient to call upon the respondents for any answer, I shall therefore advise your Lordships, on these grounds, to affirm the interlocutor, but, under the circumstances, without costs.

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The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors therein complained of be and the same are hereby affirmed.

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SPOTTISWOODE & ROBERTSON—RICHARDSON & CON-
NELL, Solicitors.

[1st July 1833.]

No. 30. CHARLES CLARK, Appellant. — *Dr. Lushington — Murray.*

JAMES SIM, Respondent. — *Stoddart.*

Agent and Client — Reparation. — Circumstances in which an agent who was employed by the lender of a sum of money, to be secured over an heritable subject, and also by the borrowers, to prepare the necessary deeds, but without any special instructions as to the form of the security, having constituted a real security, but neglected to insert a personal obligation on the borrowers or a power of sale in favour of the lender, it was held (affirming the judgment of the Court of Session) that he was liable for the loss sustained by the lender from the want of these clauses.

1ST DIVISION. **T**HE respondent James Sim raised an action in the year 1828 against Thomas Kidd and five others as a committee of management of the Associate Burgher Congregation in Cupar Angus, and also against the appellant Charles Clark, a writer there, setting forth, that in 1811 the committee entered into a minute of sale with Clark, by which they feued from him a small piece of ground for the purpose of erecting a chapel or meeting-house on it; that during the year 1815, and before the chapel was finished, but after the work was considerably advanced, the pursuer was applied to by the committee to advance a sum of money to them in loan, to enable them to complete the chapel; that the pursuer having agreed to lend them the sum of 200*l.*

Lord Newton.

for this purpose, the parties waited on Clark, and requested him in his character of agent to get the necessary deeds completed; that at this time Clark had not granted to the society or committee any feudal title to the piece of ground, they having hitherto possessed it only in virtue of the minute of sale; that Clark, having accepted the employment, was bound to have prepared regular deeds in favour of the committee, for the purpose of feudally vesting in them, for their own behoof and that of the congregation, the subjects, and should therefore have caused them to execute a regular bond in favour of the pursuer, in order that he might have had not only the personal security of the committee and congregation, but also the ground and the chapel erected thereon, in real security to him for the money which he advanced; that in place of doing so, however, Clark executed a deed, purporting to be a feu disposition by him in favour of the committee, which was subscribed by Clark alone, and contained the following clause:—

“ And as we have been accommodated by James Sim, farmer at Whiteley, with the sum of two hundred pounds sterling to enable us to build the said church, it is hereby declared, that after the feu duty payable for said ground, which is declared a prior and preferable burden, the said sum and the legal interest from the date hereof, and which shall be payable to the said James Sim, his heirs and assignees, (but the principal sum of which cannot be demanded till two years from this date,) shall also remain a real burden affecting the said subjects, and as such is appointed to be engrossed in the infestment to follow hereupon:” That this deed contained no personal obligation on any one for

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No. 30. the repayment of the 200*l.* and annual rents; whereas,
1st July to secure the pursuer against loss or damage, a regular
1833. bond ought to have been granted by the committee of
CLARK management, binding themselves not only personally,
v. but, as authorized by the congregation, binding the whole
SIM. members; that Clark infest the [committee, and officiated as notary, although he was the grantor of the deed; that the congregation had deserted the church; that the principal sum and considerable arrears of interest were now due; that the pursuer had vainly required payment of his loan from the committee or the members of the congregation, and that it had been thus through the culpable negligence or ignorance of Clark, in not preparing proper deeds containing personal obligations on the committee of management, and, as the representatives of the congregation at large, binding the whole members thereof for the payment of said loan and interest, and conveying to the pursuer, by a valid deed or deeds containing all the usual and necessary clauses, the piece of ground and chapel or meeting-house themselves in security, that the loss and damage to the pursuer had arisen, and the said Charles Clark was thereby, in the event of the pursuer not making good his claim from the said committee of management in regard of their non-liability or inability, liable and bound to indemnify the pursuer for such loss and damage. He therefore concluded against the committee for repayment of his loan with interest since 1820, and in case of failure to recover from them, then against Clark, both for these sums and such expenses as he had or should incur in endeavouring to make his claim effectual against the committee.

Clark alleged that he was employed by the committee alone; that they had informed him that if he made the loan a real burden on the disposition, the respondent would be satisfied that he had done so; that after the disposition had been delivered to the committee they employed him to act as notary, and that he accordingly took infestment in favour of the committee. He therefore pleaded, 1st, that he was not liable for the money; and, 2d, that there was no objection to his acting as notary in giving infestment.

A proof was allowed, the respondent having undertaken to prove that the appellant was fully instructed to prepare deeds securing the personal responsibility of the congregation, as well as to constitute the real burden. Two witnesses, who were members of the committee, deponed that the respondent, "in lending the money, "insisted upon a bond over the property in addition "to the personal responsibility of the members, and "this was agreed to be given to him;" "that the deponent was present in the house of David Ritchie, "vintner in Cupar Angus, when the respondent paid "down the money, and the papers were laid down by "the appellant; that he does not recollect the exact "words used by the respondent at the time, but they "were to this import:—that he hoped Clark would "or rather had taken care that all the papers were "right, as he had no other agent in the business; that "there was no other agent present at the time, and the "deponent is not aware of any other agent having been "consulted." Another witness, M^cLauchlan, gave testimony at variance with this statement.

The Lord Ordinary sustained the defences and assolizied the defender, with expenses.

No. 80. Sim reclaimed to the First Division of the Court*,
 1st July who (2d December 1831) altered the Lord Ordinary's
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* The following are notes of the opinions of the Judges adverted to by the Lord Chancellor:—

Lord Balgray.—This agent should have put Sim in possession of an heritable security executed according to the ordinary course of practice, and conferring on the lender of the money the usual facilities for its recovery. He has not done this, but on the contrary has produced a very odd species of deed; it purports to be a feu disposition, executed and signed by himself alone. He advances no money; it is another person, Sim, who does so; and he introduces a statement as if on the part of the disponees, beginning "as we have been accommodated by James Sim with the sum of 200*l.* sterling." The same clause then proceeds to say, "which sum shall be payable to James Sim, his heirs," &c. I should like to ask, payable by whom? There is nothing but the church bound to pay it by the deed. The agent should have explained to the parties, that, however much they wished to save expense in framing deeds, it was essential for the facility and security of a lender to have a personal obligation as well as heritable security, and without explicit instructions he should not have deviated so far from the course of practice as to leave the lender destitute of any personal obligants. I see no evidence that Sim was to be satisfied with a security so defective as this, which leaves him, if he has any individual personally bound to him, to seek them out, and prove the obligation by a proof led aliunde of the deed. It is quite possible that the motive of all parties might have been economy, and that this was the cause why such a deed was executed. But although this is a favourable circumstance for the agent, he has executed a deed which is professionally so much blundered that he has incurred personal responsibility to Sim. I am, therefore, for altering the interlocutor.

Lord Craigie.—I concur. A professional man, who is instructed by a lender of money to execute the necessary deeds for his interest, is not to be deterred by the expense from framing the requisite deeds and giving an effective security. Even if the lender and the borrowers expressed an earnest desire that as much economy as possible should be observed in framing the security, it was the duty of the agent to explain, especially to Sim, a rustic, what deeds were necessary in order to confer upon him the usual facility and security possessed by a lender of money under a heritable bond. When I look to the whole proceedings in this case I see so much looseness and blundering on the part of the agent, resulting in the injury of Sim, that I would alter the interlocutor and subject Clark as personally responsible.

Lord Gillies.—I take a very different view from either of the Judges who have spoken. The question arises in a penal action against this agent Clark, and it is, whether such prejudice has arisen to Sim from Clark's negligence of duty or ignorance of business as will justify us in subjecting Clark in damages. This is a question which we cannot decide against him upon vague or general views; there must be clear and explicit

interlocutor, and decerned in terms of the libel, but found him entitled, on payment of the debt, to an

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grounds to rest upon. Now what are the grounds in this case? Sim agreed with the committee to lend them 200*l.*; this was a transaction between themselves, to which Clark was no party. He appears to me to have been merely told that such a loan having been agreed on, the lender desired that it might be made a real burden upon the committee's infestment in the disposition which Clark was about to grant in their favour. Clark did accordingly grant a heritable right to the committee, burdened with a sum of 200*l.*, and they were infest under such burden. The sasine is perfectly valid; so far, then, Clark did what he was employed to do, and I think he was not employed to do more. The personal obligation of the committee could be so easily obtained, by their granting a bill or bond or letter to Sim, that he might do very well what he appears to have done by concurring in an economical arrangement profitable solely to the committee, and applying to Clark to lay a real burden on the infestment in their favour, while he dispensed with the preparation of any formal personal bond. The preparation of such a deed would have been a source of professional emolument to Clark to which he could have had no objections if his instructions warranted its execution. But it is said he was bound to have suggested to Sim the expediency of such a bond, and that he is personally liable for not having prepared it. Under the circumstances, I do not think so; but even if it were so, what is the injury to Sim from the want of it? Are not the committee personally liable to Sim for this loan, as much as if they had granted a bond? They, as disponees, accept a disposition and infestment, which narrates the loan to them, and declares it a real burden on the property disposed; they enter into possession of the church which was built with the loan, they occupy it for fourteen years, and they do not dispute the advance of the money. It cannot, therefore, be doubted that they are personally liable to repay Sim; and if they could have paid him under a charge of homing under a registered bond, they will equally do so under the decree recovered by Sim in this action. Thus Sim has his real security, and he has the personal security of those parties, who are as much bound as if they had granted a bond. I therefore conceive that this agent, who appears to have done his duty faithfully and honestly, and to have been laudably desirous to waive his own personal profit, is not liable in damages to Sim. The utmost which could have been required of him was to make a real security, and to have taken the bond or obligatory letter of the committee besides. The real security exists, and Sim has all these parties personally liable to him also. I therefore concur in the interlocutor of the Lord Ordinary.

Lord President.—At first my opinion was the same with that expressed by Lord Gillies, but, on looking at the evidence of Simpson and Kidd, my views were changed. They severally depone, that when Sim advanced the money he said to Clark, “that he hoped Clark would or rather “ had taken care that all the papers were right, as he had no other agent in

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assignation from Sim, so as to operate his relief as accords.*

Clark appealed.

Appellant.—The present is a penal action brought against the appellant for alleged neglect of duty, and before judgment can be justly pronounced against him, two points must be clearly made out:—First, that he undertook the duty; and, secondly, that he failed in the performance of it. But it has not been proved that he undertook any duty different from what he performed. The security required to be executed by him was not an ordinary piece of duty, such as is every day committed to the charge of a law agent or conveyancer; on the contrary, it is admitted that the piece of ground upon which the chapel was in course of being erected had been feued by the appellant to the committee by minute of sale in the year 1811, and, before the title deeds or feu rights had been made out, the committee, being the parties with whom he had formerly contracted, came to him in the year 1815, and requested him to interpose

“ the business.” From that instant Clark was the agent of Sim the lender, and incurred the responsibility of acting in that character. Had he meant to repudiate this, he should have immediately informed Sim that he could not act as his agent, and then Sim could have obtained another. But Clark did nothing of this kind, and being liable to Sim as his employer, I think there was so great a deviation from the course of practice, and so gross a blunder committed to the prejudice of Sim, that Clark is personally responsible. It is true that the mere obligatory letter of this committee might not have been better for Sim than what he has at present; but a registrable bond, or a bill, would have given him access to summary diligence, which could have been enforced as soon as there was an appearance of the breaking-up of the congregation, and at a time when the committee could have more easily made good their relief against the congregation. I concur, therefore, with the majority of the Court, and would alter the interlocutor of the Lord Ordinary.

* 10 S. & D. 87.

an heritable or real security on the building and ground in favour of the respondent for the sum of 200*l.*: which was done by him without fee or reward, or any charge beyond what was necessary for completing the feu rights in the ordinary manner, according to the original bargain.

The security prepared by the appellant was a good security in law for every purpose for which it was intended. The appellant has uniformly denied that he ever was employed by the respondent, and never conceived that he was so. But it is not necessary to argue the question, whether he was agent or was not agent for both parties, or how far he might not have been liable in the ordinary case to the lender of money, if upon the employment of the borrower he had undertaken to prepare deeds which he did not properly execute, and whereby the lender was injured. The respondent in the Court below rested much of his argument on the case of *Struthers against Lang**, in which it was found by the Court of Session that a law agent was liable for loss arising from an heritable security, from being ineffectually completed, although done on the employment of the granter of the bond, not of the lender of the money; and which decision was affirmed.† But the appellant does not question the authority of that case. The defence of the appellant is of quite a different nature from what was there urged, and founded on a different principle altogether; viz. that he executed properly and well every duty which he undertook, and that he cannot be made responsible for the performance of duties which

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* 1826. 4 S. & D. 421, new ed.

† 1827. Ante, Vol. II. p. 563.

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he never was employed to discharge and never undertook to perform. As therefore the interlocutor of the Court below, altering the interlocutor of the Lord Ordinary, proceeds upon an assumption that the appellant failed in the performance of duties which were never devolved upon him, and which, if they had, it would probably have been impossible for him or any one else to have performed, the judgment of the Court below ought to be reversed.*

Respondent.—An agent is liable to his employers for any loss sustained by his neglect. It is also a settled principle that the agent is equally liable for the result of his conduct, whether he is employed by the borrower or lender. The only question is, did he prepare the deed in question? and that being answered in the affirmative, his liability is a necessary consequence. An agent is bound to have the necessary knowledge of his profession before he undertakes professional employment, from which he is to derive emolument; and if he through ignorance or carelessness occasions loss to his employer he is bound to relieve him of that loss. Accordingly the appellant having been employed to prepare the security in favour of the respondent, and having neglected to frame the proper deeds or to use the proper stamps, is liable to the respondent for the damage sustained by him in consequence.

The nature of the security required from the borrower, and which the appellant was employed to draw out, was a bond containing a personal obligation, and affording at the same time a real security over the property of the

* *Authorities.* — Fraser v. Wilson, 1 S. & D. 316; 2 S. & D. 472, (affirmed); 2 Sh. App. Ca., p. 162; Erskine, b. 4. tit. 2. s. 20.

congregation. The appellant was the agent of the lender as well as the borrower, and was specially required by the respondent to attend to his interest in the transaction. The Court accordingly held, that as the deed was perfectly useless to the respondent, and as the whole property over which the security was intended to extend had been carried away by the appellant in payment of arrears of feu duty to himself, and sold for that purpose, without leaving any surplus, he was liable in payment of the debt due to the respondent.*

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LORD CHANCELLOR.—My Lords, if the question of fact, which in the judgment you are to pronounce is the only question for the consideration of this House, and which was disposed of in the Court below, had appeared to have attracted the full attention of their Lordships in coming to the decision at which they have arrived, and if all the five Judges who dealt with this question had been agreed in the conclusion of fact upon which their decree proceeds, I should, according to the observation which I made to your Lordships yesterday in a case differing most materially from the present, have been slow to express any opposite opinion. But your Lordships are left without any particular knowledge of the grounds upon which the interlocutor was pronounced by Lord Newton; his Lordship simply assoilzies the defender from the conclusions of the summons; and Lord Gillies, who agrees with him in assoilzieing the

* *Authorities.*—Maclean v. Grant, Nov. 15, 1805; Mor. App. I. Reparation, No. 2; McMillan v. Gray, March 2, 1820; Fac. Col.; Struthers v. Lang, Feb. 2, 1826; 4 S. & D. p. 418; Ante, Vol. II. p. 563; Rowand v. Stevenson, July 6, 1827; 5 S. & D. p. 903; 6 S. & D. p. 272; Ante, Vol. IV. p. 177.

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defender, does not go explicitly into the question of the evidence, or into the grounds upon which he forms his opinion, nor does it appear that he had distinctly his attention directed to the question of fact and the consequences of it. The other three Judges, so far from dealing with that question, do not appear to have ever had their attention called to it, any more than Lord Gillies and Lord Newton, who begin by assuming it to be decided one way. They say, if a client gives instructions to a professional man to prepare deeds for certain purposes, and that professional man errs in the preparation of those deeds, whereby his client is injured, then that he (the professional man) shall answer for the damages which the client has sustained in consequence of his error in the preparation of the deeds. That is the sum and substance of the opinions of these two learned Judges, Lord Gillies and Lord Newton, which I take to be a proposition as clear as any that ever was stated, and to require no proof whatever. But the question here is precisely upon the fact which their Lordships assume; namely, whether there were instructions given? or if there were not, whether there was such an employment of this gentleman, Mr. Clark—either by his being directly employed by the party himself, or by his acting for the party, and the party adopting him as his professional adviser,—so as to give the party giving or adopting the employment the right to damages, and to have indemnity against any error committed by him, if it shall be found or admitted that he has committed error?

Now, my Lords, the only one of the Judges in the Court, from which the interlocutor is brought, of the First Division, who appears to have addressed his mind

at all to this question, and to have examined the evidence, is the Lord President; and he relies upon the testimony of two witnesses, one a person of the name of Simpson and the other of the name of Kidd; and upon that evidence he holds that there is sufficient ground for fixing Mr. Clark with the responsibility as a professional agent. But I must observe, that his Lordship says nothing of the evidence of M^cLauchlan, which is, in my view of the subject, much more important, and has a much more direct bearing upon the question than the evidence of Simpson and Kidd, even if you suppose both of them to have been wholly unprejudiced and unbiassed witnesses. That is the impression I have had upon examining the evidence of M^cLauchlan; for it leaves no doubt of the fact upon the mind, as the evidence of Simpson does, even if you believe every one of his assertions. Now, no observation is made by any one of the Judges upon a circumstance which appears to be very material in considering this question of evidence,—namely, the lapse of time that has occurred; which is important in two ways, both as affecting the testimony of the witnesses, and also as affecting the merits of the case in regard to the thing done, or rather the thing omitted to be done. Here much depends upon the precise form of expression supposed to be used in the conversation referred to by Simpson:—that Sim, the lender of the money, said to Clark, the present appellant, “he hoped he would, or rather had taken care that all the papers were right, as he had no other agent in the business,” and, he trusted to him. There is a considerable difference between these two forms of expression, and the Lord President seems to have been aware of that; because he appears, first of all, to have

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been on that side, but at last he seems to have understood the words as if they were, "he hoped he would see that all the papers were right," and not "that he had seen that they were right;" for he says, from that time Clark became the agent of Sim, and he was bound, if he did not mean to act as his agent, to repudiate the agency, and to give notice to Sim to this effect. Such is the purport of the Lord President's observation; but it must be recollected that the words are, "he hoped he would, or rather had seen that all the papers were right." I do not mean to say that this makes any very decisive difference as to the responsibility, in whichever form the expression is taken; because, if he had said, "I hope you have seen that the papers are right," and the other party did not immediately put him upon his guard and say, "Yes, they are all right, but I have no personal bond from the parties," the obligation would have been just the same as against him, according to the Lord President's view of the case, namely, that he was bound to have repudiated the agency, and not to have gone on acting upon it after he had made the observation. But I mention this circumstance to show that the same observation does not apply to the evidence of M^r Lauchlan, and to show how much the lapse of time may affect the credit of the testimony given by the witnesses. But it is also very material as regards another part of the case, namely, the value of the omission said to have been made by Clark, because it is admitted on all hands that even if no instrument were given, there was still the personal responsibility incurred by the borrower; he was bound without any letter or without any bill. That is referred to by the Lord President; the mere borrowing of money made a personal

responsibility beyond all doubt, and upon that personal responsibility, and that alone, the decret has gone which has been pronounced against these individuals.

But then, they say, it is very true that upon their personal responsibility there might have been an action and a decret against them; but if they had been bound either by bond or by bill there would have been a registration of the instrument, and you might have obtained summary diligence according to the admirable and wholesome provisions of the Scotch law, which I am happy to say I have every reason to expect now will soon become the law of this country. Now, the question is, what is the nature of the difference? And here the lapse of time is most material, although no observation is made upon it by either of the Judges; the difference regards the risk the creditor runs during the delay necessarily consequent upon taking proceedings on their personal responsibility without bond. He may bring his action and then get his decret; but persons may be solvent in the beginning of an action and insolvent at the end; in which case, if you had had a bond you would at once have obtained the fruits of it by a summary diligence. Now, with what face does the party complain of this injury when he lies by for thirteen years from the date of the transaction before he brings this action, and eight years from the time when the payments were in arrear? For he sets forth in his own summons that it was in the year 1815 that the money was advanced by him, and that the interest is due thereon since September 1820, and he brings his action in the year 1828. I do not mean to say that these circumstances are decisive one way or the other; but until I have more fully considered the whole of this

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case I cannot recommend to your Lordships to do more than give time for further considering the whole facts of this case, and the whole evidence upon which we may discuss the conclusion at which the Judges arrived in the Court below.

I regret exceedingly that a question of this sort should have found its way here. It is a question of no great importance as regards the amount, which does not exceed 200*l.*, and it is among parties some of whom are not in very affluent circumstances. I regret it, not only on account of the trifling amount of the sum in dispute, but also because it has not proceeded in such a course as could give it a fair chance of the most satisfactory decision; I mean in a trial by a judge and a jury, where there would have been the examination of the witnesses *vivâ voce*. How it happens that the other course was taken which leads to the greatest obscurity with the longest delay, and which must be the least satisfactory to the suitor, instead of that in the shortest time and with the greatest possible security to justice, it is not for me to inquire. But in the circumstances I think it would be better to postpone the final consideration of this question.

Adjourned.

LORD CHANCELLOR.—My Lords, when the case of Clark v. Sim was last before your Lordships I expressed the great doubts which I entertained upon the question of fact, from which I was not relieved by finding a concurrence of opinion among the learned Judges in the Court below by whom the case had been decided, two of those learned Judges taking

one view of the case, and the other three taking the opposite view : I entertained at that time so much doubt, that I could not advise your Lordships then to affirm the judgment. I feel bound to say that I still think it a matter of some doubt. I am not, however, prepared to say that the majority of the learned Judges were wrong ; but taking it upon the whole, I am not disposed to advise your Lordships to disturb that judgment. Considering, however, the doubt which rested upon the matter of fact, and the questionable nature of some of the evidence, as a sufficient excuse for the party bringing that case by appeal before your Lordships, I think there is not ground for imposing upon him the payment of costs. Having made observations on the case when it was before your Lordships, I feel it necessary now to say no more than that I feel it my duty, upon the whole, to move your Lordships that the interlocutor be affirmed, but that I shall not advise that the respondent should have his costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors, so far as therein complained of, be and the same are hereby affirmed.

RICHARDSON & CONNELL—M^cCRAE, Solicitors.

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No. 31. ELIZABETH RALSTON or ALLISON, Appellant.—*Solicitor General (Campbell)*.

JOHN ROWAT, Respondent.—*Follett—M'Neil*.

Process—Proof.—In a reduction of a deed of settlement instituted by a party who had been served heir to the grantor, he adduced a witness who deponed that he considered himself a nearer heir than the pursuer; that he had intimated to the defender his intention to challenge the deed, and although he did not obey a charge which he got to enter heir he reserved his right to do so; that he believed he had not been served; that his mother was third cousin of the grantor, and he was grandson of the daughter of the grantor's ancestor, whose marriage he had not yet been able clearly to prove, although he had not yet made all the exertion in his power to do so; that he had nothing to do with the present case, but that, although he had not made up his mind to do it, he might challenge the deed, if he proved his propinquity; that he certainly did not withdraw his claim as heir at law, and had not renounced it in favour of the pursuer:—Held (reversing the judgment of the Court of Session), that he was a competent witness.

2D DIVISION.

THE appellant, as one of the heirs-portioners of provision and of line served and retoured to the deceased John Allan of Ellsrickle, brought against the respondent an action of reduction of a deed of settlement alleged to have been executed on the 19th August 1829 by Allan, in favour of the latter, on the ground of informality in

the subscription, and also on that of death-bed; and the following issues were prepared:—"Whether the disposition and deed of settlement, No. 7. of process, dated 19th August 1829, sought to be reduced, is not the deed of the late John Allan of Ellsrickle?" "Whether on the said 19th day of August 1829, the date of the said deed, the said John Allan was on death-bed?"

The case came on for trial (18th July 1832) before the Lord Justice Clerk and Lord Mackenzie and a Jury, when the appellant proposed to adduce as to both issues Dr. Robert Buchanan, a surgeon in Dumbarton. On being examined in initialibus by the respondent he declared that Mr. John Kennedy, writer in Glasgow, was his agent in December 1829, and that he Dr. Buchanan as heir-at-law desired the said John Kennedy to intimate by letter to Mr. John Leslie, the agent for John Rowat the defender, his intention to challenge the said deed; and the said witness read the said letter to the Court, and which letter is in the terms following: viz. — 'Glasgow, 2d December 1829.—' 'Dear Sir, I am directed by Dr. Buchanan of Dumbarton to intimate to you, as agent for Mr. John Rowat of Whiteshawgate, that his (Dr. Buchanan's) not obeying the charge given him on the 3d ult. will not be held as any acquiescence in the validity of Mr. Rowat's title as disponee of Mr. John Allan, which title he accordingly reserves to himself to challenge and set aside, as well as to enter heir to the deceased Mr. Allan when he shall see it expedient to do so. I am, &c.' And being cross-interrogated, he declared that he could not say whether any step had been taken. Some inquires had been made,

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“ but he was not prosecuting any action at that time ;
“ there was then no pending action. The late Mr. Allan
“ was third cousin of witness’s mother ; he is grandson
“ of a Mrs. Macfarlane, daughter of John Allan, and he
“ had to connect himself with this John Allan through
“ his grandmother. That John Allan was a writer in
“ Glasgow in 1725 ; that a difficulty in proving his marriage occurred, and consequently of the legitimacy of
“ Mrs. Macfarlane ; that he the witness had made some
“ exertions to clear this up, but certainly not all that
“ could be made. Some records had been searched, and
“ an advertisement put in the newspapers for the purpose of removing this difficulty : it has not yet been
“ removed. He had not been served heir, he supposed ;
“ but he was perfectly ignorant of the steps necessary ;
“ that this is the obstacle not yet removed. He had
“ nothing to do with this lawsuit, nor contributed to it ;
“ but if he proved his propinquity and proved his pedigree he might challenge this deed. He had not made
“ up his mind, and had not made any inquiry for about
“ a year.” Having been re-examined by the counsel for the respondent, he declared, “ that he certainly did
“ not withdraw his claim as heir-at-law ; at that moment he considered himself a nearer heir than
“ Allison (the pursuer) or Purdon (the other heir-portioner). He had not renounced his claim in their
“ favour.”

On this the respondent objected that he was inadmissible, and the Court sustained the objection. The appellant excepted to the opinion, and declined to proceed with the cause, when the jury found for the respondent ; and the Court, on 27th February 1833, refused a bill of exceptions.

Mrs. Allison appealed.

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Appellant.—There is no evidence on the record to show that Dr. Buchanan at the period of his being called as a witness had any interest whatever in the issue. It is admitted that the whole facts out of which the interest is said to arise are contained in the witness's initial examination, as embodied in the bill of exceptions, and that unless his rejection is justified by the facts therein set forth it cannot be justified at all. But assuming all the statements in that initial examination to be true, they do not prove that Dr. Buchanan had any interest whatever in the issue. They do not even amount to proof of a belief or opinion on the part of the witness that any interest existed. The substance of the witness's statement is, that the late Mr. Allan of Ellsrickle was a third cousin of the witness's mother, the connexion being deduced through a person of the name of John Allan, who was a writer in Glasgow in the year 1725, and who had a daughter, Mrs. Macfarlane, who was the witness's grandmother. There is no statement of the relative degree of propinquity in which the appellant stands to the deceased, so as to make it appear on the record that the appellant's connexion with the deceased is more remote than that of the witness, unless it be considered that this is afforded by the witness's statement,—“that he considers himself” as standing in a nearer degree. But it is not necessary for the appellant to rest any thing on this defect; because, as the interest of Dr. Buchanan does not depend on the degree of natural relationship in which he may stand to the deceased, but on his possessing the status of lawful heir, it is of no importance whether his degree of relationship

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be nearer than that of the appellant, unless his connexion is deduced through legitimate channels. But Dr. Buchanan does not say that he is a lawful descendant of John Allan. On the contrary, he expressly admits that there is no evidence that John Allan was ever married, and, consequently, no evidence that the witness's grandmother was other than a natural daughter. He does not even say that there was a tradition in the family in regard to his great grandmother's marriage, or an understanding that his grandmother was a legitimate daughter. Nor does he say that he himself believes that she was so. In these circumstances, Dr. Buchanan's statement could not have been held as amounting to a distinct assertion of legal propinquity. But the case does not stand on this negative ground. The witness not only does not state himself to be the lawful descendant of John Allan, but depones to circumstances which render it extremely improbable that he is so. He admits that the records had been searched, and that evidence of John Allan's marriage had been advertized for without success; that he had ceased for some time to make any further inquiry, and that he was not prosecuting any action on the subject. When the remote nature of the fact of John Allan's marriage is considered, these circumstances amount to a very strong presumption that Dr. Buchanan has no reasonable prospect of being able to establish it, and, accordingly, he does not say that he has. All that he says, is, "if he proved his propinquity and proved his pedigree he might challenge this deed." When to these circumstances is added the admitted fact, that the appellant stands legally vested under a formal service with the character of one of the nearest lawful

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heirs of Mr. Allan of Ellsrickle, it is going too far to hold Dr. Buchanan's testimony as proving that he is entitled to that character in preference to the appellant.

But even assuming that his evidence established that he was the nearest lawful heir of Mr. Allan, it would not prove Dr. Buchanan to have such an interest in the issue as the law considers necessary to exclude him from being examined as a witness. The rule as to the interest that disqualifies from being a witness is substantially the same in Scotland as in England. Accordingly, the English authorities on the subject were recognized and founded upon by the Judges in delivering their opinions. The result of the authorities is, that in order to exclude a witness, his interest must be a certain, direct, and immediate interest in the issue of the cause; the nature of which is, that the verdict or decree to be pronounced may be produced for or against him in a subsequent action to which he may be a party. The bias of the law is, for very obvious reasons, towards admitting evidence, leaving the degree of credit to be given to it to be determined by the jury. "The old cases on the competency of witnesses," says Lord Mansfield, "have gone upon very subtle grounds; but of late years the Courts have endeavoured as far as possible consistently with those authorities, to let the objectors go to the credit rather than to the competency of the witness. Accordingly, it is now fully established that in order to disqualify a witness on the ground of interest, the interest must be certain, and not contingent, and also a direct interest in the issue of the cause. It is not enough that a witness stands in a similar situation with a party for whom he is called, or that the verdict to be given may come to the

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“ of a future jury, so as to affect their judgment in
 “ the witness’s case.” In the words of Mr. Justice
 Buller, “ In order to show a witness interested, it is
 “ necessary to prove that he must derive a certain
 “ benefit from the determination of the cause either
 “ one way or other.” In like manner Chief Baron Gil-
 bert lays down the rule thus: “ The law looks upon a
 “ witness as interested where there is a certain benefit or
 “ disadvantage to the witness attending the consequence
 “ of the cause one way.”* In the noted case of *Bent v.*
Baker† Lord Kenyon is reported to have said, “ I think
 “ the principle is this:—if the proceeding in the cause
 “ cannot be used for him he is a competent witness, al-
 “ though he may entertain wishes upon the subject, for
 “ that only goes to his credit, and not to his competency.”
 This accordingly has in the later practice been considered
 the true test of a disqualifying interest. Mr. Serjeant Peak
 deduced the following as the rule resulting from a variety
 of decisions to which he refers:—“ The general rule now
 “ established is, that no objection can be made to a
 “ witness on this ground, unless he be directly in-
 “ terested, that is, unless he may be immediately bene-
 “ fited or injured by the event of the suit, or unless
 “ the verdict to be obtained by his evidence or given
 “ against it will be evidence for or against him in
 “ another action in which he may afterwards be a party.
 “ Any smaller degree of interest, as the possibility that
 “ he may be liable to an action in a certain event, or
 “ that, standing in a similar situation with the party
 “ by whom he is called, the decision in that case may
 “ by possibility influence the minds of the jury in his

* *Gilb. Ev.* 106.

† 3 *T. R.* 27.

"own, or the like, though it furnishes a strong argument against his credibility, does not destroy his competency."* The same principle is followed in the law of Scotland. "Interest in the cause," says Lord Stair, "makes witnesses inhabile as to that cause, if they can gain or lose thereby. But that 'fovent 'consimilem causam' is not a good objection; for that conjunction of interests relates to the relevancy and not to the verity of the cause."† The law is laid down in similar terms by Lord Bankton, and has been uniformly acted upon in the later practice of the Courts.

The legal test, therefore, of Dr. Buchanan's interest is, whether any verdict to be pronounced in the cause could be produced as *res judicata* for or against him in any subsequent action to which he might be a party? It is clear that it could not, because the doctrine of *res judicata* is founded on an implied contract between the litigating parties to abide by the judgment to be pronounced as final and definitive between them, and therefore can only be pleaded for or against those who were parties to the contract.‡

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* Peake, Ev. 141.

† Stair, b. 4. tit. 43. s. 7.

‡ *Authorities*.—Walton v. Shelley, 1. T. R. p. 300; Bent v. Baker, 3. T. R. p. 27; Bankton, 2. p. 645, M'Kenzie, Murray's Rep. vol. 2. p. 219, Forbes, Murray's Rep. vol. 3. p. 44; Bank. 4. tit. 25. s. 7; Campbell v. Grange, 20th March 1543, Balfour, 564. Mor. 4717; Elder v. Ferguson, 2d Feb. 1610; Mor. 14049; Clume v. Harthill, 17th Feb. 1631, Mor. 14055; Stair, b. 4. tit. 40. s. 17; A. v. B., Mor. 14032; Glendinning v. Earl of Nithsdale, 6th and 13th Jan. 1675, Mor. 12226. 12227. 14031. and 14032; Gadgirth v. Auchinleck, 26th Jan. and 13th July 1631, Mor. 9707. 9709. 9710; Anderson v. Fleming, 9th Jan. 1695, Bro. Supp. 4. p. 297; Phillips, vol. 1. p. 53; Peak.; Britton, Mur. Rep. vol. 4. p. 46. Campbell, *ibid.* 176, Clark, *ibid.* 3. p. 452.

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Respondent.—The examination of Dr. Buchanan established—1st. That he was reputed to be the heir of law, or one of the heirs-at-law of Mr. Allan, and in that character had been regularly charged to enter heir. 2d. That he did not disavow that character, but believed himself to be a nearer heir than the appellant. 3d. That when charged to enter heir he reserved to himself to take that step, and to challenge the deeds of Mr. Allan when he should see it expedient to do so. 4th. That he had taken certain steps with a view to the establishing of his right. 5th. That he had not relinquished his purpose of challenging the deed, and at that moment considered himself the true heir. 6th. That unless his grandmother was illegitimate, which is not to be presumed, he is a nearer heir than the appellant. Now according to the rules and principles of the law of Scotland, a clear objection of interest arises sufficient to exclude the witness. The law of Scotland recognizes a variety of grounds for excluding witnesses. Relationship within certain degrees is recognized as a ground for excluding witnesses, because the law presumes that their minds will be biassed in favour of one side. Agency and partial counsel are recognized as grounds for excluding witnesses on the same presumption, and because they are indications of zeal and interest on one side. Ulteriorousness, or coming forward to give evidence without the compulsitor of citation, is for the like reason recognized as a ground for excluding witnesses. Interest in the cause, so as to be affected by the issue, and that either immediately or directly, or by plain inference, such as the witness, if he be a person of ordinary understanding and forethought, cannot fail to make, is recognized as a sufficient ground to exclude the witness,

whether the interest be such as affects him patrimonially, or such as affects him in his character and reputation. This last ground of exclusion is very rigidly observed. Thus, Mr. Tait says*, “ If a tenant “ of a mill, having a right of thirlage, have raised “ processes for abstracted multures against the different “ tenants of the barony, though in point of form these “ different actions are separate and independent, no “ one defender seems to be a competent witness for “ another, as far as their defences are connected, as he “ must see the influence which his deposition must have “ upon his own cause.”

The proposed witness has a personal interest to promote a verdict and judgment in favour of the appellant reducing the deed of Mr. Allan. He has also a personal interest to prevent a verdict and judgment in favour of the respondent upholding the deed of Mr. Allan; and the circumstances in which he states himself to be placed, in reference to the subject matter of the cause, are such as to give, in the estimation of law, such an undue bias as to render it unsafe to admit his testimony.

LORD WYNFORD.—My Lords, I am to move your Lordships to proceed to judgment in a case that was argued before your Lordships the other day, which was an appeal, in which Mrs. Elizabeth Ralston was the appellant, and Mr. John Rowat was the respondent. This is what is called an action of reduction and improbation; it was instituted for the purpose of setting aside a deed which had been executed by a person of the name

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of John Allan in favour of the respondent. It was sought to set aside that deed upon two grounds; first, that the deed had never been executed by John Allan; and, next, that at the time of the execution by John Allan, supposing it to have been executed, John Allan was upon his death-bed and incompetent. For the purpose of proving one of those facts a person of the name of Dr. Buchanan was called. Dr. Buchanan was examined on what your Lordships here understand by the *voir dire*, but, as it is called in Scotland, in *initialibus*—that is, an examination for the purpose of sustaining an objection to his testimony. It appears that upon that examination he gave evidence as follows:—“The late Mr. Allan”—that is, the person who made the deed of settlement, “was third cousin of witness’s mother; he is grandson of a Mrs. Facfarlane, daughter of John Allan, and he had to connect himself with this John Allan through his grandmother.” John Allan, the maker of the deed, was therefore his great grandfather:—“that John Allan was a writer in Glasgow in 1725.” The deed proves that. Your Lordships will see the difficulty that must attend this man making out any thing like a title, on which the question of his admissibility will mainly depend:—“that a difficulty in proving his marriage occurred, and consequently of the legitimacy of Mrs. Macfarlane. That he, the witness, had made some exertions to clear this up, but certainly not all that could be made. Some records had been searched, and an advertisement put in the newspapers, for the purpose of removing this difficulty;—it has not yet been removed. He had not been served heir, he supposed; but he was perfectly ignorant of the steps necessary; that

“ this is the obstacle not yet removed. He had nothing
 “ to do with this law suit, nor contributed to it ; but
 “ if he proved his propinquity and proved his pedigree
 “ he might challenge this deed. He had not made up
 “ his mind, and had not made any inquiry for about
 “ a year : that he certainly did not withdraw his claim
 “ as heir-at-law.” My Lords, upon this it was insisted
 that Dr. Buchanan could not be examined as a witness,
 inasmuch as he stated that he had some reason to
 believe,—not stating any positive opinion,—but that he
 had some reason to believe that he was a nearer heir
 than the pursuer. He had instituted no proceedings
 however, and it was clear that he had not removed the
 difficulty as to the legitimacy of his grandfather ; and if
 that difficulty could not be removed, he was no more
 the heir of this party than he was of any one of your
 Lordships. This evidence having been objected to, the
 two learned Judges who attended the trial sustained the
 objection, and he was not examined, in consequence
 of which the pursuer failed in his case. My Lords,
 under these circumstances, by a late statute that is
 made the statute law of Scotland, in which it is agree-
 able to the law of England, the parties tendered a bill
 of exceptions, to bring before the Court the question of
 the admissibility of the evidence of Dr. Buchanan. The
 question came under the consideration of the Court of
 Session, and the Court of Session decided that Dr. Bu-
 chanan was not a good witness. I have, however, the
 satisfaction to state to your Lordships that that judg-
 ment was not supported by the unanimous judgment of
 the Court ; it was pronounced by a majority of three
 to two. There was a circumstance in the case which
 your Lordships know is provided for ; the Lord Com-

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10th July gave his opinion in that state of the proceeding in
1833. which he is empowered to take a part in the decision.
RALSTON My Lord Commissioner Adam's opinion was against
v. the judgment of the Court of Session. My Lords,
ROWAT. thus stands the case on the ground of authority;—
 taking the authority of Lord Commissioner Adam to
 be of weight, it was decided only by a majority of one.
 Now, I have the greatest respect for the learned Judges
 of the Court of Session; from the judgments I have
 seen in this House, they are entitled to all the respect
 due to the Judges in any court of justice in this king-
 dom; but I may perhaps be permitted to say, that if
 I was to make a distinction between one Judge and
 another upon a question of evidence, I should certainly
 be disposed to prefer the authority of my Lord Com-
 missioner Adam, who had had considerable practice in
 the courts of justice in this country before he was
 appointed to that office in Scotland, and was also a
 Scotch advocate, and intimately acquainted with the
 principles of Scotch law, and who has had for several
 years his whole mind directed to the consideration of
 questions of evidence, being the presiding Judge in
 that Court of Scotland in which these questions prin-
 cipally arise. I cannot help thinking, therefore, that
 if we look at authority only, the weight of authority is
 strongly opposed to this decision. My Lords, if this
 were a question to be decided by English law, I do not
 think any learned Judge in any Court of Westminster
 Hall could hesitate for a moment. Those of your
 Lordships who are familiar with the law of evidence
 well know that it is now a settled rule in Westminster
 Hall to incline against objections to the competency of

a witness, and to allow objections to prevail only against credit. It has been settled, ever since the case of *Walton v. Shelley**, which was decided by Lord Mansfield a great many years ago, that no objection to competency can be sustained unless the witness has a direct interest, that is, unless the record in that cause can be either used for him or against him; and ever since the decision of *Bent v. Baker* undoubtedly it would not go to his competency, though it may go to his credit. I might mention to your Lordships another case which occurs in the English courts;—a man's heir-at-law may be called as a witness to prove the father's right to the estate, though the instant the breath is out of the father's body the estate descends upon the heir. The remainder-man, if there is one, cannot be called as a witness because he has a vested interest. The heir-at-law has no interest which can be made any immediate use of; he has a contingent estate depending upon his surviving his father, and something like a moral certainty that whenever his father shall die he will succeed to the estate. That certainly is a stronger case than the present, for what has this man? I do not think it very likely that he will ever have a vested interest; he has been trying for several years to establish the legitimacy of his grandfather, and cannot do it at present; it is at most but a contingent interest—I should say scarcely any. I submit, therefore, to your Lordships, that if this case was brought in and discussed in an English court of justice, no Judge would hesitate; however the objection may apply to the credit of the witness, it leaves his competency untouched. But your Lordships

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ROWAT.* *Walton v. Shelley*, 1. T. R. p. 296.† *Bent v. Baker*, 3. T. R. p. 27.

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are now sitting on a Scotch case. It was not argued at your Lordships bar—the question was hardly raised—whether it is that sort of contingent interest which I perceive disqualifies in Scotland. It was put upon the ground that it was impossible this witness could have any interest at all, and that was put upon the ground that the judgment in this case could not be used in a cause to which he was a party. I have stated to your Lordships that the principle of the English law is, that if the judgment cannot be used for or against him, a man is competent in this country. It appears to me, from the cases referred to, and which your Lordships will find in the printed cases, there is no great difference between the law of Scotland and the law of England with respect to interest, though there certainly is considerable difference between the law of Scotland and the law of England as to evidence in other particulars. My Lord Stair, a great authority, as your Lordships know, in the law of Scotland, lays down this as the law, very much the same as would be laid down in Westminster Hall,—“Interest in the cause makes witnesses
 “ inhabile as to that cause if they can gain or lose
 “ thereby; but that foveant consimilem causam is not
 “ a good objection, for that conjunction of interests
 “ relates to the relevancy and not the verity of the
 “ cause.” My Lord Bankton has also stated the law nearly in similar terms. Now then, my Lords, we are to see whether this judgment could ever be used in favour of or against this person; and here it appears to me that the principle of the law of Scotland is the same as that of the law of England—that the judgment could be used only between the same parties, except in one or two cases which I will mention by

and by. It is undoubtedly clear that no judgment can be given in evidence, unless the individuals were parties in the cause, unless they take the estate under the other. It is quite clear that this witness called is not party or privy in any way to this cause, for if he comes in he proves the present pursuer is an intruder; he says, "You have no right—I do not claim under you—" "I am no successor of yours, (which is the ground of decision in one or two of the cases I shall presently have occasion to mention,) "but I come because I have "a preferable title." They are as perfect strangers to each other as any persons can be. Lord Stair says, "The "first and most common exception in all processes "is *exceptio rei judicatæ*; that the controversy is "already decided by a competent judge, which is relevant, albeit it would be a decret of an inferior court, which, if it have no evident nullity, is relevant till it be reduced; neither is the nullity a reply, but an objection arising from what appears in the decret, for if it be a nullity arising from the process and minutes it cannot be insisted on till these be called for and produced in a reduction. *Res judicata* is relevant, not only being a decret between the pursuer and the defender, but it is sufficient if it was between their predecessors and authors." So that your Lordships perceive Lord Stair states, that the objection cannot be received at all, unless they were parties, or connected with these parties. My Lord Bankton says,—“This exception lies where the case that was formerly judged between the parties and their authors is sought to be judged again while that judgment remains unreversed; for it cannot be brought under cognizance again,—the rule being, that res

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“ *judicata pro veritate habetur*, the judgment of a
 “ court is held to be true and just;” and again, “ it is
 “ a rule, that *inter alios acta vel judicata aliis non*
 “ *nocere*, conform to the rubric and whole laws in the
 “ title of the code so inscribed.” That is not only, your
 Lordships know, the principle of those courts, but it is
 expressed in precisely the same words by English lawyers;
 they have derived this rule from the same source from
 which the Scotch lawyers have derived it, namely, from
 the civil law; they therefore have expressed the rule
 in precisely the same language. My Lords, if that be
 so, then it appears to me it is perfectly clear that this
 judgment never could be made use of in any cause in
 which Dr. Buchanan might be a party. Dr. Buchanan
 being no party in the cause in which the point arose,
 it was, I think, admitted at the bar, that supposing the
 present pursuer should get into possession, and Dr. Bu-
 chanan should then set up a claim against him, and
 establish the legitimacy of his grandmother, the present
 title would hardly be permitted to stand, as he would
 seek to reduce the deed as against the person pursuing.
 But it was argued, and very ingeniously argued, by a
 learned counsel at the English bar, Mr. Follett, that
 this would have the effect of giving Dr. Buchanan
 possession, and he insisted that, according to the English
 law, that would render Dr. Buchanan liable to objec-
 tion, because a tenant cannot be called now in sup-
 port of the defender’s case, because it supports his
 own possession. But your Lordships will at once see
 the difference. In that case the effect would be to
 turn the tenant out of possession. Now here a great
 many other steps must be taken before he can be got
 out of possession; he cannot be got out of possession

without having to overcome difficulties which would not occur in that case; and it cannot be said that he is directly interested in the event of the cause; he has only a contingent interest dependent on various circumstances. It is said that he is interested, because, if he proved that this deed could not be set up against him the appellant would get into possession. Suppose he did, another suit will dispossess him; and I think there would be no difficulty, by some rule of proceeding in the Scotch court, to provide that he should not be allowed to say that the reduction, obtained by the judgment in a case in which he was a witness, ought, so far as respected him, to be binding. My Lords, two cases were cited which I have not looked into, because I did not feel it necessary. It was said that, by the law of Scotland, if a man is indicted for perjury and convicted, and he shall afterwards obtain a pardon, the prosecutor might sue for the injury done to his family by the perjury, and that the judgment and conviction in the case of the perjury would be evidence in that second cause. My Lords, undoubtedly in that respect the law of Scotland differs from the law of England; for your Lordships know that an indictment of perjury has been rejected in our courts, and it has been said it could not be received, because, in the first place, the parties were not the same; that in one the King was the prosecutor, and the plaintiff in the other. My Lords, if those cases are of any authority, undoubtedly there is a different law in Scotland; but suppose that be the law of Scotland, does it bear on this case? No, it does not, unless the actual prosecutor in the indictment, and the plaintiff in the action suing for damages, is precisely the same; and that, there-

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fore, the Scotch courts consider that it is a determination exactly between the same parties, not merely the nominal party, but the real party, being the party at whose instigation the prosecution was instituted, and also the same party, who brings the action. Another case has been cited at the bar, namely, the case of an indictment for piracy, where there has been an action afterwards brought by the person who was injured against the person who was benefited by that piracy. To this, I should beg to submit, precisely the same observation applies. Another case was cited, the case of *Rutherford v. Nisbett's trustees**, in which it was found that a judgment pronounced in favour of an individual, whose service as heir of provision had been called in question on the ground of illegitimacy by the immediate heir of provision entitled to succeed, failing lawful issue, was effectual against a subsequent heir of provision attempting reduction on the same ground. Now, my Lords, it is material to attend to the ground on which the Court decided that case. The Lord Ordinary says, "The general rule of law is clear, that in order to found the exception of *res judicata* (for it is an exception to be pleaded, not a ground of incompetency in the action,) it must appear that the former suit was between the same persons, concerning the same thing, and on the same cause of action." (That is the principle I have already stated.) "But the question here is, whether the pursuer, insisting as heir apparent under a special destination, is not to be considered as the successor of the former apparent heir in this matter?" He is let in, therefore,

* *Rutherford v. Nisbett's Trustees*, 12th Nov. 1830, 9 S., D., & B. p. 3.

as we should say, as the privy of the party in the former suit. Your Lordships will observe, that the person against whom the case had been decided before proceeded precisely on the same grounds on which the then pursuer proceeded, namely, the ground of the legitimacy of the party holding the estate. The first pursuer having gone out of the way by death, the second pursuer comes, the interest of the pursuer devolving upon him. He brings this action; he is to be considered, as we should say here, privy to the interests of the first pursuer. Upon that ground the judgment pronounced in the former case was considered, on the principle of *res judicata*, as applying to the case then under consideration; but, as your Lordships see in the present case, Dr. Buchanan is no successor of the present pursuer; on the contrary, what he says is this,—

“ The present pursuer has nothing to do with this estate ;

“ the moment this deed is set aside the estate is mine,

“ and not yours. I stand nearer in blood to the settler

“ of this estate than you do, and therefore you have

“ nothing to do with it.” It appears to me, therefore, that this case does not bear upon the point; that it is distinguishable from it, and upon that ground I have ventured to state to your Lordships that the present pursuer is an utter stranger to Dr. Buchanan, and Dr. Buchanan must be treated as such in case he instituted any proceedings, and that consequently he is not within the principle established in the cases which have been relied on; and I think I have now adverted to all the cases which have been referred to in the course of the argument, and stated the principles on which they were decided. I think this case does not come within the exception established by those cases, but is to be governed by that principle of law which I consider to be

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equally the law of Scotland and of England,—that no judgment can be given in evidence ; and this appears to be the opinion of the majority of the Judges ; for though they decide that the witness is not competent, three of them appear to me very distinctly to admit the principle. I cannot help thinking, therefore, that this case is to be governed by that general principle,—that this is not to be considered as *res judicata* between Dr. Buchanan and the persons who are parties to this cause ; and I am also of opinion (but I speak with more diffidence upon that part of the case than I do upon the other, because that was not much argued,) that Dr. Buchanan's interest is of that uncertain contingent kind that it is impossible for any court of justice to object to his competency, and that the objection operated only to his credit. I feel it, therefore, my humble duty to submit to your Lordships that this judgment ought to be reversed. I state again that I feel very great regret that I should have to call upon your Lordships to reverse a judgment of the learned Judges of the Court of Session ; men possessed of knowledge much greater than the individual now addressing your Lordships can pretend to ; but in the present case I am removed from that difficulty by the observation I made at the outset, that, considering the superior knowledge of Lord Commissioner Adam upon the law of evidence, it appears to me that the balance of authority in the Court below is against the decision. I move your Lordships that this judgment be reversed.

The House of Lords ordered and adjudged, That the interlocutor complained of in the said appeal be, and the same is hereby reversed.

ALEXANDER DOBIE,—GEORGE WEBSTER, Solicitors.

[12th July 1833.]

M. GILFILLAN, Appellant.—*Dr. Lushington—Busby.* No. 32.A. P. HENDERSON, Respondent.—*Solicitor General*
(*Campbell*).

Partnership—Pactum Illicitum.—A secret agreement was entered into between a law agent in the country and a person who was about to practise before the Supreme Court, by which the former, in consideration of his advancing money for the business, stipulated that he should receive one third of the profits.—Held (affirming the judgment of the Court of Session), that such an agreement was pactum illicitum.

ON 17th October 1818 a minute of agreement was entered into between the appellant, a writer in the country, and the respondent, then a clerk in Edinburgh, whereby the former engaged to make an instant advance of 100*l.* to enable the respondent to be admitted an agent before the Supreme Court, and to place at his disposal the sum of 400*l.*, and such farther sums of money as from time to time might be required for conducting the business, engaging at the same time to promote the respondent's interests "as much as shall not interfere with the free exercise of his own profession;" and in return stipulated for one third of the profits to be realised from the business, which he was to be entitled "to retain from his own private and from his clients' accounts." It was

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provided that the agreement should be kept "private," and that it should subsist for five years from 11th November 1818. No formal contract was executed, and the respondent alleged that the only stipulation which had been fulfilled by the appellant was the advance of 100*l.*, (the greater part of which had been repaid shortly afterwards,) and some advances from time to time during the first ten months to the amount of 245*l.*, which were insufficient to discharge sums disbursed on the appellant's own private account and that of his clients. The parties continued to act under the agreement for the stipulated period, and to do business together till October 1826, when the respondent, declining to do farther business for the appellant, raised action against him for payment of sundry accounts. On the other hand the appellant raised a counter action, in June 1827, against the respondent, concluding that he should hold just count and reckoning with the appellant; that it should be declared that the agreement between the parties was valid and obligatory, and that the respondent was bound to produce states of the profits and losses arising in his business from November 1818 to November 1823, and to pay the appellant his proportion thereof in terms of the minute of agreement. In defence it was maintained, *inter alia*, that the agreement was illegal. The Lord Ordinary pronounced this interlocutor, 13th December 1831:—"The Lord Ordinary
" having heard parties procurators and considered the
" closed record, finds that by the agreement libelled the
" pursuer, an agent in Glasgow, undertook to employ
" the defender, an agent in Edinburgh, in the business
" of his clients, and in return stipulated for a third part
" of the profits derived by the defender from that

“ business : Finds that it was also part of the agree-
 “ ment that it should be kept secret : Finds that such
 “ an agreement was illegal ; and therefore sustains the
 “ plea of pactum illicitum, assoilzies the defender from
 “ the conclusions of the action, and decerns : Finds the
 “ defender entitled to expenses, and allows an account
 “ thereof to be given in, and to be taxed by the
 “ auditor.”

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Against this interlocutor a reclaiming note was presented by the appellant, and the Court having adhered (12th May 1832)* Gilfillan appealed.

Appellant.—The agreement of copartnery contains no stipulation to do any thing unlawful. The decision involves a principle that must strike at the root of many existing contracts of copartnerships between most respectable practitioners in both parts of the island, the lawfulness of which has never before been brought into doubt. The terms of the contract amount to nothing more than an ordinary contract of copartnery for five years between two professional men, and as far as concerns the relative interests of the parties is perfectly fair and legal. The appellant was not to conduct the business, but merely to advance the necessary capital, and use his influence in obtaining employment for the partnership. If there had been any thing in the contract by which it was stipulated that the appellant, without qualifying himself as an agent in the Court of Session, should have the power communicated to him of practising as an agent in that Court, the objection would have been obvious, as in that case the

* 10 S. & D., p. 523.

No.32. contract would have involved a fraud upon the Court
12th July of Session and the practitioners in that Court, whose
1833. monopoly it infringed, and would have fallen within
GILFILLAN the rule of *Brashe v. Mackinnon*, the only case relied
v. upon by the respondent.* But there was no such
HENDERSON. stipulation.

Respondent.—It was illegal for the appellant, who was not qualified or admitted to practise in the Court of Session, to stipulate for a share or proportion of the respondent's emoluments as a practitioner there in return merely for his assistance in obtaining business for him,—those emoluments, by law and by the regulation of Court, being appropriated exclusively to practitioners, and being calculated and fixed as suitable and necessary for maintaining their usefulness, independence, and respectability, and being thus *ex sua natura* incommunicable to a stranger. It also was a fraud upon the public and his employers for the appellant, while he held himself out in the ordinary character of a writer in Glasgow, to attempt to form a secret compact for participating in the profits of the litigation that he might recommend or advise before the Supreme Court, thereby creating an influence and temptation inconsistent with his duty to his employers, and of which at least those employers were entitled to be publicly made aware, if it existed. The alleged arrangement would have been a violation of the revenue laws, by admitting the appellant to privileges which he was not with reference to those laws qualified to exercise. The secret agreement founded on is of a

* Fac. Coll. 19th March 1820.

nature altogether so unjust and injurious, so derogatory to the legal profession, and so inconsistent with the interests of the Court, of clients, and of the public, that it ought not to be sanctioned or enforced.

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LORD CHANCELLOR.—My Lords, as I entertain no doubt whatever of the propriety of the decision which the learned Judges in the Court below have come to, I shall not delay your Lordships longer to consider this case, but shall move your Lordships now to affirm the interlocutors appealed from. My Lords, as to that part of the case which relates to the conduct of the party, Mr. Henderson, at whose instigation it is alleged that the arrangement was made, and who was undoubtedly as much a party to that illegal arrangement as was the other gentleman, Mr. Gilfillan, and with respect to that part of the case which relates to his conduct in availing himself of the objection,—your Lordships have nothing whatever to do with it. He may have reasons which would extenuate, or, it may be, would furnish a justification of his conduct; but, even if it were without extenuation or without justification, it must be remembered that those observations are applicable to all cases in which two parties enter into a contract in which one of them sets up that it is invalid in law as a defence against the other. The Court before whom the question is carried have nothing whatever to do with that; there is no reason whatever why the Court should express any opinion upon the conduct of parties. If they have by law a right to avail themselves of an objection, from that moment the Court before whom the question is brought has no choice, but it must of necessity relieve against a fulfilment of the unlawful contract.

No. 32. My Lords, as regards the next point—the merits of
12th July the case: whatever might be the law with respect to a
1833. contract of partnership entered into between two persons,
GILFILLAN both of whom were qualified to perform the business in
v. the Courts in question, and which contract of partner-
HENDERSON. ship, openly and before all the world, held both the
partners out as such,—whatever, I say, might be the
law with respect to such a partnership as that,—your
Lordships have nothing to do with it in this case, nor
had the learned Judges in the Court below; that is
not this case. This case differs from the one just put in
these material facts: first, that both of the parties in
question were not qualified to practise in the Courts;
and next, that it was a part of the articles of the part-
nership, or the agreement which constitutes here a
partnership, that it should be kept secret from all the
world. Either of those grounds, it appears to me, would
be sufficient to dispose of this question. The Court below
have preserved the law, and, as far as I am able to judge,
have most justly decided the question. It is impossible
for any one to say that the principle on which they have
decided is new. At all events, it is not the only case
of the kind, because *Brashe v. Mackinnon* is clearly a
case upon the point. The Court there held unani-
mously, although it is by inadvertence stated to be by
a majority, that the contract was improper on the part
of each party; by which, I take it, we are to understand
that it was in its nature *pactum illicitum* in both parties.
One does not exactly understand the word “improper,”
in a judicial sense, to mean any thing more than some-
thing which the Court cannot sanction; what must have
been meant was, that it was improper to make profits

of the proceedings before any other Court than the Court in which the party was allowed to practise; and therefore the Court, first of all, declared that it was illegal in an agent,—that it was contrary to the practice of the Court, and against the law of the Court, for a solicitor or procurator or agent in a superior Court to make profit of the proceedings before an inferior Court. This was the impropriety in that person, namely, the agent in the superior Court; and their Lordships also held, that there was a similar impropriety in a solicitor before an inferior Court entering into an arrangement by which papers to be given into Court by him were to be drawn by other persons, while he was bound to certify that they were drawn by himself. That does not apply to the present case. But the illegality imputed by this judgment to one of those parties exists in some degree here; for if it is improper that the agent in a superior Court should make a profit of the proceedings before an inferior Court, this can of course only be because the agent in the superior Court is not a practitioner before the inferior Court. The circumstances of that case then apply to the present as well as the judgment; for there the Court discountenanced a party, even if qualified to practise in his own name before an inferior Court, practising in another man's name before such inferior Court. Now, here Mr. Henderson practises in the superior Court in his own name, the other party, Mr. Gilfillan, not being enabled to have his name appear as a practitioner in that Court; and this was of course kept secret. Therefore, in every point of view in which the finding in *Brashe v. Mackinnon* can be taken, I can see no dis-

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No. 32. tinction whatever. My Lords, this is a matter of practice (as was justly stated by the Solicitor General,) with which your Lordships would be slow indeed to interfere, if the question had now for the first time come before the Court; and I make this observation the rather because this case of *Brashe v. Mackinnon* is said to have been decided after the contract in question had been entered into. The contract, as I understand it, was entered into in the year 1818, and *Brashe v. Mackinnon* was not decided until the year 1820. Even if the decision here had not proceeded upon that case, I should still have been very slow to differ from the Court below in a matter of practice.

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My Lords, with respect to the second ground; that seems to me to be quite sufficient to decide the case, even if the first were not enough. I entirely agree with the learned Judges in the Court below, that a contract is illegal between two parties which keeps their clients in ignorance of its purport. This being a contract of partnership under which the country solicitor acquired an interest in the profits of the town solicitor's practice, that, I should conceive, upon public principle would be sufficient to invalidate the contract. Therefore, my Lords, I entirely agree with the learned Judges of the Court below, that this is illegal in both respects: in respect of its being a contract in which one of the parties could not practise in the superior Court, and in respect of its being a contract in which there was an obligation of secrecy as against all the world, including the client. I humbly move your Lordships, therefore, that these interlocutors of the Court below be affirmed, with such costs as will cover the expenses.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondent the sum of 201*l.* 14*s.* 6*d.* for his costs in respect of the said appeal.

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A. DOBIE—H. HYNDMAN, Solicitors.

[12th July 1833.]

No. 33. THOMAS BAILLIE, Appellant.—*Lord Advocate (Jeffrey)*
—*Dr. Lushington.*

THOMAS BAILLIE, and others, Executors of CHARLES
BAILLIE, Respondents.—*Serjeant Spankie—Murray.*

Clause—Proof—1. Construction of an agreement under which the appellant was bound, not merely to account for, but to pay 2,000*l.*; and interim decree granted for the same affirmed. 2. Incompetent to control the agreement by extrinsic evidence.

1ST DIVISION.
Lord Newton.

THE late Charles Baillie executed a deed in favour of the appellant, under which the latter intromitted with his funds to the extent of 3,000*l.* On the death of Charles, the respondents, as his executors, raised an action of reduction of the deed against the appellant, and also an action of count and reckoning. These actions were conjoined; and the case having been prepared for trial by a Jury, the parties, on 11th July 1831, entered into the following agreement:—"The parties agree to dismiss the jury on the following terms:—1. The deed shall be held to be reduced. 2. The pursuers shall be entitled to vindicate their rights as if the deed under reduction had never been executed. 3. Except, that in settling with the defender for the 3,000*l.* odds sterling, which he acknowledges himself to have intromitted with, belonging to the pursuers, they shall give him credit for the sum of 1,000*l.* as his outlay and account."

The Court thereafter pronounced this judgment :—
 “ 15th November 1831.—The Lords, in terms of the
 “ minute of arrangement of 11th July last, between the
 “ parties, reduce, decern, and declare in terms of the
 “ reductive conclusions of the libel, and quoad ultra
 “ remit the conjoined actions to Lord Newton, Ordinary to the cause, to hear parties in the count and
 “ reckoning, and dispose of the cause generally, as to
 “ his Lordship may seem proper.”

Lord Newton then, on 19th November 1831, “ decerned in the meantime against the defender for payment to the pursuers of the sum of 2,000*l.* sterling, and allowed interim decree for the same to go out and be extracted, the pursuers before extract producing confirmation of their title as executors, and appointed the defender within three weeks to give in a state of his intromissions.”

The Court having adhered to this interlocutor, Baillie appealed.

Appellant.—The true meaning of the compromise is, that, to save the necessity of investigating the amount of the appellant’s intromissions, it was to be stated at the sum of 3,000*l.*; that in settling or calling him to account he was to be allowed to retain one third part thereof; but that it was to be open to him to shew discharges of the remaining 2,000*l.* Notwithstanding, the Court below have pronounced an interim decree, *de plano*, for the full sum of 2,000*l.*; and, quoad ultra, have ordered a state of the appellant’s whole intromissions. Their Lordships could not have gone so far, supposing there had been no compromise, and that the respondents had

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gained the case at the trial. They could only in that event have reduced the deed, and ordered an investigation as to the amount of the appellant's intrusions under it; and no interim decree could have been pronounced, as the appellant never admitted that there was any balance whatever in his hands. But it is not to be presumed that the appellant, by compromising the case, meant to put himself in a worse situation than he would have been in by losing it. Besides, he offered to prove, by the draft of the agreement and other evidence, that the extent of his liability of accounting was to be restricted to the sum of 2,000*l.*; and that he should also be allowed the opportunity of accounting for the 2,000*l.*

Respondents.—The agreement is in itself quite explicit, and the attempt to control the construction of it by production of the unauthenticated draft, is incompetent.

LORD CHANCELLOR.—My Lords, I humbly move your Lordships that these interlocutors be affirmed, with full costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors, so far as therein complained of, be and the same are hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondents the sum of 211*l.* 9*s.* 10*d.* for their costs in respect of the said appeal.

ATWOOD SMITH—MACDOUGALL and BAINBRIGGE,
 Solicitors.

[16th July 1833.]

JAMES ADAMSON and others, Appellants.—*Knight—* No. 34.
Murray.

Mrs. MARGARET STORMONTH OF DARLING and others,
 Respondents. — *Lord Advocate (Jeffrey).*— *Solicitor*
General (Campbell).

Testament — Clause — Minor.—Question, 1, As to the construction and effect of a clause in a deed of settlement, as to a party being bound to deduct a certain sum, in the event of succeeding to a bond, from a provision in a deed of settlement; and, 2, Whether a minor was sufficiently bound so as to prevent her resiling from an agreement by her legal guardians.

THE late Mr. James Stormonth was proprietor of the estates of Lednathy, Inverchroskie, and Whitefield, and was the uncle of the appellant Adamson, and of the respondent Mrs. Margaret Stormonth or Darling. He held an heritable bond for 2,400*l.* granted in 1803 by the late Lord Meadowbank, which he had taken payable to himself in life-rent, whom failing, to his natural son Charles Stormonth, also in life-rent, and his issue in fee; whom failing, to Adamson in life-rent, and his issue in fee; reserving power to alter this destination. In virtue of that power he executed, on 16th February 1805, a deed, in which he set forth, “being satisfied that the
 “ said James Adamson, my nephew, will act with propriety in the management of the said sum of 2,400*l.*

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“ sterling, in case of the death of the said Charles Stormonth,
 “ month without issue, or such issue being extinct, I,
 “ in terms of the power of alteration conferred on me by
 “ the said bond, have resolved to remove the restriction
 “ of the said James Adamson’s right to the said principal
 “ sum to a life-rent, and hereby destinate and appoint the
 “ said principal sum, in the event of the said Charles Stormonth
 “ dying without issue, or of such issue, although
 “ once existing, being extinct before receiving payment,
 “ to be paid to the said James Adamson, or the heirs of
 “ his body ; whom failing, to James Stormonth Darling,
 “ second son of the said Margaret Stormonth, and the
 “ heirs male of his body ; whom failing, to the other
 “ persons called to the succession of my lands and
 “ estate of Lednathy in their order ; whom all failing,
 “ to my heirs or assignees whomsoever ; and for rendering
 “ this alteration effectual, I hereby assign, make
 “ over, and convey to the said Charles Stormonth,
 “ during all the days of his life, the annual rent of the
 “ said sum of 2,400*l.* sterling ; and in case of his death,
 “ and leaving lawful issue of his body, the said principal
 “ sum, with such interest as may be then due thereon,
 “ to such issue, share and share alike ; and, failing such
 “ issue, to the said James Adamson, and the heirs of
 “ his body ; whom failing, to the said James Stormonth
 “ Darling, and the heirs male of his body ; whom failing,
 “ to the other persons called to the succession of
 “ the said lands of Lednathy in their order ; whom all
 “ failing, to my heirs and assignees whatsoever.”

On the 18th of the same month he executed a trust disposition and deed of settlement, by which he conveyed his estates of Lednathy, Inverchroskie, and Whitefield to Mr. and Mrs. Darling, and to Adamson, and others, in

trust for various purposes, and in particular to convey Lednathy to the eldest son of Mrs. Darling, and with power to sell the lands of Inverchroskie and Whitefield, declaring that “ upon such sale taking place, my said “ trustees are hereby appointed to pay off all the debts, “ legacies, and donations which may be then resting ; “ and after deduction thereof, and of the expense of “ management, shall account for and pay over to the “ said James Adamson one fourth part of the residue of “ the price of the said lands, and pay and divide the “ remainder of said three fourth parts of said prices “ amongst the children of the said Margaret Stormonth, “ other than the said James Stormonth Darling, or any “ other son of the said Margaret Stormonth who shall “ succeed to me in the said lands of Lednathy, share “ and share alike ; but declaring that in the event of “ the said James Adamson succeeding to the sum of “ 2,400*L* sterling contained in and due by a bond “ granted to me by the Honourable Allan Maconochie “ of Meadowbank, one of the senators of the College of “ Justice, and Alexander Maconochie, his son, in consequence of a conveyance thereof executed by me on “ the 16th of February current in favour of Charles “ Stormonth, and the heirs of his body, and failing them, “ the said James Adamson, he shall be obliged to dis- “ count and allow out of his fourth share of the price “ of said lands settled on him as aforesaid the one half “ of what he shall recover upon said bond and convey- “ ance thereto, which, in that event, shall be paid to “ and divided amongst the children of the said Margaret “ Stormonth, along with the three fourth parts of the “ prices to be got for the said lands in the county of “ Perth, appointed to be sold in manner foresaid ; and

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No. 94. “ also declaring, that if any of the children of the said
 16th July “ Margaret Stormonth shall be under age when any of
 1833. “ these sums come to be divided, my said trustees are
 “ to lend out the shares of such children as may be
 ADAMSON “ under age, for their behoof, and to apply the interest
 and others “ thereof, or such part of the capital as they may think
 v. “ proper, for promoting said children in trades or mar-
 DARLING “ riage, as to them shall seem proper.”

He afterwards conferred on Mrs. Darling a power of dividing the provisions made in favour of her younger children in such proportions as she should see fit.

By another deed dated the 25th August 1812, he disposed to Adamson, and to the heirs of his body, the lands of Inverchroskie and Whitefield, and all other estates, heritable and moveable, then belonging to him, or which might belong to him at his death, under certain exceptions ; and he named Adamson to be his sole executor and universal intromittor with his personal estate. He also bequeathed a life rent annuity of 50*l.* to Mrs. Darling, and a legacy of 6,000*l.* to her children, carrying interest from his death and payable within twelve months thereafter.

This deed contained the following clause :—“ And I
 “ hereby revoke and recal all deeds and settlements
 “ which I have at any time previous hereto made or
 “ executed in favour of and for behoof of the said
 “ Margaret Stormonth (Mrs. Darling) and her chil-
 “ dren, or either of them, and also all annuities, legacies,
 “ and provisions which I have at any time previous
 “ hereto made or settled upon them or either of them ;
 “ and specially I do hereby revoke the whole annuities
 “ and provisions made and settled upon them or for
 “ their behoof by the said trust disposition and settle-
 “ ment executed by me upon the 18th day of February

“ 1805, and codicils thereto subjoined; but excepting
 “ always from this revocation the said trust disposition
 “ and settlement and codicils, in so far as they relate
 “ to my said lands of Lednathy and the annuity of
 “ 50*l.*, with which these lands are burdened, to the said
 “ Margaret Stormonth.”

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Mr. Stormonth died in October 1817, and on the 27*th* of that month an agreement was entered into between Mr. and Mrs. Darling, on behalf of themselves and their children, on the one part, and Adamson on the other, which was in these terms:—“ The said James Adamson stated that, according to the wish of the said Margaret Stormonth and her family, he agreed that they should succeed to the three fourths of the lands of Inverchroskie and Whitefield, which were settled on them by the said trust settlement dated 18*th* February 1805, in terms of and under the conditions and provisions and burdens contained in said trust settlement and codicils thereto; provided they agreed to renounce in his favour the benefit of the provisions settled on them by the said disposition and settlement of the said James Stormonth, dated 25*th* August 1812; and also provided they agreed to claim no more from the tenants as arrears of rent than what the said James Adamson should certify to be due by them. To all which the said James Darling and Margaret Stormonth for themselves, and as taking burden on them for their children, consented and agreed; and the said James Adamson, and Margaret Stormonth and James Darling for themselves, and as taking burden on them for their said children, severally became bound to execute and to get executed all deeds and writings necessary for carrying this

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“ agreement into effect. It being thus agreed that the
 “ succession to the lands of Inverchroskie and White-
 “ field should be regulated solely by the said trust set-
 “ tlement of the said James Stormonth, dated 18th
 “ February 1805, and codicils thereto, whereby the
 “ said James Adamson has right to the remaining fourth
 “ part thereof, the said James Darling and the said
 “ James Adamson hereby accept of the office of trustees
 “ under the said deed, and they request that Mr. Thomas
 “ Watson, who is appointed a trustee by the said
 “ deed, will also accept of the office of trustee, and
 “ act along with them. The parties appoint the before-
 “ mentioned deeds to be put on record, and extracts
 “ to be thereof obtained.”

Infetment was thereafter taken in virtue of the deed
 of 1805.

In 1827 Mrs. Darling and her children raised an
 action against Adamson and Watson, the trustees,
 libelling, inter alia, on the two dispositions and deeds of
 settlement executed by Mr. Stormonth on the 18th of
 February 1805 and the 25th of August 1812, and the
 minute of agreement, dated 27th October 1817; and
 concluding, inter alia, “ that the said Thomas Watson
 “ and James Adamson, as having accepted of and acted
 “ under the said trust, should be ordained to concur
 “ with the said James Darling and Margaret Stormonth,
 “ or the survivor of them, in selling the said lands of
 “ Inverchroskie and Whitefield, and applying the price
 “ in the way and manner pointed out by the said trust
 “ deed and settlement, and to do or cause to be done
 “ at the sight of the said Lords whatever might be ne-
 “ cessary for rendering the titles of the trustees valid
 “ and sufficient; and to subscribe and execute articles

“ of roup, missives of sale, and dispositions or other
 “ conveyances of the said lands to the purchasers
 “ thereof; and also to concur with the said James Dar-
 “ ling and Mrs. Margaret Stormonth or Darling, or
 “ survivor of them, in applying the prices of the said
 “ lands in the manner directed by the foresaid trust
 “ deed and the codicils thereto.”

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Lord Fullerton, on the 11th March 1830, pro-
 nounced this interlocutor:—“ Finds, that by a trust
 “ disposition and settlement, dated 18th February 1805,
 “ the late James Stormonth conveyed to the defenders
 “ alongst with the pursuer Margaret Stormonth or
 “ Darling, and her late husband, the lands of Inver-
 “ chroskie and Whitefield in trust for certain purposes
 “ therein specified: Finds, that by the said trust deed
 “ the trustees were directed upon expiry of the then
 “ current tacks to sell the lands, and to bind the
 “ grantor in absolute or other warrandice: Finds, that
 “ exclusively of an annuity of 50*l*. to the pursuer Mar-
 “ garet Stormonth or Darling, and of certain other an-
 “ nuities, the trustees were directed to apply the rents
 “ of the lands and the prices, when sold, to the extent
 “ of three fourths for behoof of the children of the said
 “ Margaret Stormonth and the said James Darling,
 “ and to pay the remaining fourth of the said rents and
 “ prices to the defender James Adamson: Finds, that
 “ by another deed executed on 25th August 1812 the
 “ said James Stormonth revoked the foresaid trust deed,
 “ in so far as it contained the foresaid annuities and
 “ provisions in favour of Margaret Stormonth or her
 “ children, and conveyed the lands of Inverchroskie and
 “ Whitefield to the defender James Adamson under
 “ burden of a life-rent annuity to Mrs. Darling of 50*l*.

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“ and a legacy of 6,000*l.* to her children : Finds, that
“ the last disposition and settlement contained neither
“ procuratory of resignation nor precept of sasine :
“ Finds, that after the death of Mr. Stormonth the
“ defender James Adamson on the one part, and
“ Margaret Stormonth and her late husband James
“ Darling, as taking burden on themselves for their
“ children, on the other part, entered into a written
“ agreement by which both parties passed from their
“ rights under the deed 1812 in reference to the said
“ lands of Inverchroskie and Whitefield, and to the
“ foresaid annuity and legacy therein contained respec-
“ tively, and recurred to the deed 1805 as fixing their
“ rights with regard to these lands of Inverchroskie and
“ Whitefield ; and that the parties ‘ became bound to
“ ‘ execute and get executed all deeds and writings ne-
“ ‘ cessary for carrying this agreement into effect :’
“ Finds, that in consequence of this agreement infest-
“ ment was taken on the trust deed 1805 by the defen-
“ ders Adamson and Watson, and that since that
“ period possession has been held and intromission
“ with the rents taken place by the defenders, as trus-
“ tees, or their factor, in virtue of the said trust deed,
“ and that payments have occasionally been made to
“ account of the purposes of the trust : Finds, that in
“ these circumstances, and according to the fair con-
“ struction of the deed of agreement, the pursuers are,
“ on the one hand, bound to discharge their claims
“ under the deed 1812 ; and, on the other, the defenders,
“ James Adamson and the other trustees, are bound to
“ account for the rents, in terms of the trust deed 1805 :
“ Finds, that the defenders are also bound to proceed
“ immediately to carry the trust deed into effect, by

“ selling the lands in terms of and with the benefit of
 “ the warrandice authorised by the said trust deed
 “ 1805 ; and with the view of implementing the said
 “ agreement, and effecting the said sale, remits the case
 “ to Mr James Jollie, writer to the signet, to adjust the
 “ terms of the discharge to be executed by the pursuers,
 “ of the deeds or deed which may be necessary to re-
 “ move any objections to the title of the trustees arising
 “ from the revocation contained in the deed 1812, and
 “ the terms of the articles of roup of the said lands, and
 “ to report upon the same *quam primum*.”

To this judgment the Court adhered on the 17th November 1830. In obedience to the remit, Mr. Jollie prepared the draft of a deed, containing mutual discharges and renunciations between Mrs. Darling and her children and Mr. Adamson ; and a trust disposition and conveyance by Mr. Adamson, and Mr. Watson and Mr. Adamson, to Mrs. Darling and themselves. By the draft of this deed power to sell the lands was given as in the deed of 1805, and then there was the following clause :—“ In the sixth place, upon such sale taking
 “ place, that the said trustees may, after the deduction
 “ of the expense of management, account for and pay
 “ over to the said James Adamson one fourth part of
 “ the residue of the price of the said lands, and out of
 “ the remaining three fourth parts of the said price set
 “ aside and lend out, on such security as they shall
 “ approve of, a capital yielding an interest sufficient to
 “ satisfy the foresaid *liferent* annuity of 50*l.* to the said
 “ Mrs. Margaret Stormonth or Darling ; and thereafter
 “ to pay over to, and divide among, the children of the
 “ said Mrs. Margaret Stormonth or Darling, other
 “ than the said James Stormonth Darling, (excepting

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“ in so far as the said James Stormonth Darling is or
“ may be interested in any share of the remainder of
“ the three fourths of the said price, as one of the
“ nearest of kin of the said deceased Elizabeth Darling,
“ his sister,) the remainder of said three fourth parts
“ of said price, in such shares and proportions as the said
“ Margaret Stormonth or Darling may appoint to be
“ paid to each of them by a writing under her hand ;
“ but in case the said Margaret Stormonth or Darling
“ shall fail to execute such writing, then an equal
“ division among said children is to take place ; and, in
“ the event of the said annuity ceasing, the capital set
“ aside for answering the same shall be paid and divided
“ by the same proportions ; but declaring, as by the
“ said trust disposition and settlement of the said James
“ Stormonth it is declared, that in the event of the said
“ James Adamson succeeding to the sum of 2,400*l.* con-
“ tained in, and due by, a bond granted to the said
“ James Stormonth by the deceased Honourable Allan
“ Maconochie of Meadowbank, formerly one of the
“ senators of the College of Justice, and Alexander
“ Maconochie, now one of the senators of the said Col-
“ lege of Justice, in consequence of a conveyance thereof,
“ executed by the said deceased James Stormonth on
“ 16th day of February 1805, in favour of Charles
“ Stormonth and the heirs of his body, and failing
“ them, the said James Adamson, he the said James
“ Adamson shall be obliged to discount and allow out
“ of his fourth share of the price of said lands set-
“ tled on him as aforesaid the one half of what he shall
“ recover upon said bond and conveyance thereto,
“ which, in that event, shall be paid and divided amongst
“ the children of the said Margaret Stormonth, along

“ with the three fourth parts of the prices to be got for
 “ the foresaid lands appointed to be sold in manner
 “ foresaid; and also declaring, that if the said Ellen
 “ Stormonth Darling, the youngest child of the said
 “ Margaret Stormonth or Darling, shall be under age
 “ when any of these sums come to be divided, the
 “ trustees shall lend out her share or shares for her
 “ behoof,” &c.

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Several objections were taken by the appellants to this report, and in particular that the clause relative to the rights of Adamson to the bond for 2,400*l.* should be expunged, and a reference made to the clause in the deed of 1805, so that the rights of parties should be regulated by it; and, 2d, that as Ellen Stormonth Darling was minor, security was not afforded so as to bind her effectually to ratify the deeds on attaining majority. On considering these objections Lord Fullerton pronounced the following interlocutor on the 8th July 1831 :—“ Repels the objections to Mr. Jollie’s report, approves thereof, and also of the drafts of the deeds prepared by him, and referred to in said report; and of new remits to him to get the said deeds extended and executed by the parties: Farther finds the defenders liable to the pursuers in the expenses occasioned by their objecting to said report; and remits the account thereof, when lodged, to the auditor, to tax the same, and report.

“ *Note.*—The only point attended with any difficulty is the proposed clause relative to the bond for 2,400*l.* But the Lord Ordinary thinks, in the first place, that the point does admit of being decided under the present summons, as the summons contains an express conclusion for the application of the price to be obtained

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 16th July “ ment to the defender, Adamson, of one fourth of said
 1893. “ price, under the declaration expressed in the trust
 — “ deed above narrated, being the very declaration in
 ADAMSON “ the deed 1805 relative to this bond. 2d, It appears
 and others “ to the Lord Ordinary that the point is decided by the
 v. “ general finding in the interlocutor of 11th March
 DARLING “ 1830, that by the agreement of 1817 ‘ the parties
 and others. “ ‘ recurred to the deed 1805, as fixing their rights
 “ ‘ with regard to the lands of Inverchroskie and White-
 “ ‘ field,’ as the pursuer in her summons, and her first
 “ pléa in law, clearly called for the division of the price
 “ according to the deed 1805, under the declaration
 “ therein contained regarding the bond ; while the de-
 “ fender contented himself in his pleas with denying in
 “ general the effect ascribed to the agreement by the
 “ pursuers, of setting up the deed of 1805, without
 “ putting in any special plea in relation to the declara-
 “ tion as to the bond for 2,400*l*. 3d, Even if the ques-
 “ tion were open it appears to the Lord Ordinary that,
 “ as the declaration respecting the bond in the deed
 “ of 1805 truly formed, according to that deed, a con-
 “ dition affecting the division of the price of the lands
 “ of Inverchroskie and Whitefield, the agreement of
 “ 1817, according to the fair construction of its
 “ terms, which, as an onerous transaction, it is entitled
 “ to receive, necessarily revived the deed 1805 in
 “ this particular, as well as all the others fixing the
 “ interests of the different parties in the price of the
 “ lands.”

The appellants reclaimed to the Inner House, and
 prayed the Court to alter, and in particular “ to find that,
 “ in the event of Mrs. Darling exercising the power of

“ division conferred on her by Mr. Stormonth’s trust
 “ settlement of 18th February 1805, before the deed of
 “ ratification by Ellen Stormonth Darling is delivered
 “ to the defender James Adamson, she is bound to set
 “ apart for Ellen Stormonth Darling as much of the price
 “ of the lands as will be equal to her claims against the
 “ said defender, under Mr. Stormonth’s settlement of
 “ 25th August 1812.” The Court, however, adhered
 on the 9th December 1831.*

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Adamson and others appealed.

Appellants.—1. The destination made by the testator of the bond for 2,400*l.* to Charles Stormonth in life-rent, and to his issue in fee, whom failing, to the appellant, Mr. Adamson, in fee, was never altered or revoked. The object of the qualification in the trust deed of 18th February 1805 was to equalize the succession of the testator at his death, between his nephew, Mr. Adamson, and the family of his niece, Mrs. Darling. With that view he provided for the contingency that Charles Stormonth might predecease him, whereby the equality of succession at the testator’s death might be disturbed by Mr. Adamson receiving the full sum of 2,400*l.* In that event, to equalize the division, he was required to “dis-
 “ count and allow” half the amount of the bond out of his share of the price of the lands. But Mr. Adamson was not required to pay back to the family of Mrs. Darling any share of the bond received after the death of the testator, and in the event of succeeding at some distant period to Charles Stormonth and his issue.

* 10 S. & D., p. 119.

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It is also inconsistent with the agreement of 1817 to hold that Mr. Adamson was to remain bound contingently to pay money to the respondents; because, as Mr. Charles Stormonth had by that time succeeded to the bond for 2,400*l.*, Mr. Adamson could “discount and “allow” nothing on account of it out of his share of the testator’s funds then divisible. Accordingly, by the terms of the minute of agreement, Mr. Adamson was held absolutely entitled to a fourth share of the lands of Inverchroskie and Whitefield; and the succession to the bond for 2,400*l.* was also thereby held to be regulated by the deed of 16th February 1805. But the deed which is proposed to be executed will preclude the appellant from maintaining any such plea, and therefore matters should be allowed to rest on the terms of the deed of 1805.

2. It is unjust to require the appellants to sign a deed binding them instantly to sell the lands of Inverchroskie and Whitefield, and to divide the price among the children of Mrs. Darling who are of age, reserving only such sum as she may think fit to direct for the share of her youngest daughter, without security being given that this daughter will be satisfied with that share, and will not at majority reject it, and exact payment (which she will be entitled to do) of her sixth share of 6,000*l.*, and interest from her grand-uncle’s death, as settled on her by his deed of settlement of 1812.

Respondents.—1. The interlocutors, in so far as they find that in the event of Mr. Adamson succeeding to the bond he must discount from his one fourth of the price of the lands a half of whatever he may recover under the bond, are in precise conformity with the deeds libelled. By the terms of the bond itself, and of the subsequent deed

of Mr. Stormonth, it stands destined to Mr. Charles Stormonth, whom failing without issue, to the appellant Mr. Adamson and the heirs of his body. But by an express clause in the trust deed of 1805 it is provided, that in the event of Mr. Adamson succeeding to this bond he must deduct one half of his recoveries under it from his fourth share of the price of the lands to be sold under the trust deed. Though the trust deed was recalled by the disposition of 1812, yet it was by the agreement of the parties expressly revived or restored, to the effect of having the succession to the trust lands regulated or divided "in terms of and under the conditions and provisions and burdens contained in said trust settlement." The declaration as to the bond formed an important condition or provision in the trust deed, and that condition was by the terms of the agreement completely preserved. But the new trust deed prepared by Mr. Jollie necessarily contains the condition or provision in the original trust deed as to this bond. If Mr. Adamson shall ultimately succeed to the bond, then he will, in virtue of this declaration in the trust deed, be bound to discount one half of the sum recovered under the bond from his fourth share of the price of the lands. It may be very improbable that Mr. Adamson will ever succeed to the bond; and if he should not, then the condition in the deed will never come into operation.

2. The power of division in favour of Mrs. Darling is not conferred upon her by the deed prepared by Mr. Jollie. She received that power solely from the trust deed of 1805, which has been specially confirmed by Mr. Adamson. The case supposed by Mr. Adamson can never occur, and no claim against him can ever arise. Mrs. Darling is a party to the proposed deed, and she is specially taken bound amongst

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with the other obligants to procure a ratification from her daughter on her attaining majority; and Mrs. Darling likewise comes under an obligation of absolute warrandice of the discharge and renunciation to Mr. Adamson. Mrs. Darling, therefore, could never exercise the power of division to the effect supposed. That would be a direct violation of her own obligation in the present deed. Any such division would not only be ineffectual as in a question between Mr. Adamson and Mrs. Darling, but it would also be invalid to Mrs. Darling's children as in a question with Mr. Adamson. He is quite secured against the fancied claim by the terms of the proposed deed; for, first, he has the conjunct warrandice, as well as an express obligation to procure ratification, by the curator of Miss Darling, and of nine other obligants, all of whom are perfectly responsible; and, secondly, by the deed the trustees are taken specially bound to lend out Miss Ellen Stormonth Darling's proper share of the price during her minority. The appellants form a majority of the trustees, and they will consequently have the entire direction as to the investment of the minor's share of the price. They have in this way a farther and sufficient security in their own hands.

LORD CHANCELLOR.—My Lords, in the case of Adamson v. Stormonth there were two points; and upon one of those points, the first, I expressed at the time my opinion that the appellant was precluded from taking his objection; but that even if he were not, and he could go into it, I was inclined to the same opinion to which the Lord Ordinary and the Court came. Upon the second point, entertaining some doubt, I wished for further time. The doubt I entertained was,

whether the parties were not entitled to further indemnity; if so, it should be now directed, without altering the judgment in any other respect, and that would only go to the question of the costs of the appeal. It was for the purpose of considering this matter, whether or not they had a right to further indemnity, and if so, what your Lordships might be advised to do upon it, that the case was postponed; and upon further consideration, I do not feel that the point arises properly here. I am of opinion, therefore, that this judgment should be affirmed with costs.

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The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors, so far as therein complained of, be and the same are hereby affirmed: And it is further ordered, That the appellants do pay or cause to be paid to the said respondents the sum of one hundred and fifty pounds for their costs in respect of the said appeal.

SPOTTISWOODE and ROBERTSON—RICHARDSON and
CONNEL,—Solicitors.

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No. 35. FRANCIS GRAHAM, Appellant and Respondent.—
Dr. Lushington—Robertson.

JOHN ALISON, Appellant and Respondent; and JOHN
 BROWN and the representatives of COLIN ALISON,
 Respondents.—*Sir C. Wetherell—Murray.*

Agent and Client—Adjudication—Reparation—Entail. — A law agent was employed by a creditor to lead an adjudication against the entailed estate of his debtor; and the agent raised a summons concluding for decree of adjudication of the debtor's life-rent interest in the lands, which he obtained, and employed another agent to complete a feudal title on the decree by charter and sasine, which was done accordingly; but it was afterwards found that they were inept as a feudal title, in respect the fee and not the life-rent ought to have been adjudged: Held (affirming the judgment of the Court of Session), that the original agent was liable in repetition to the creditor of the expense of the charter and sasine, but not in damages; and that the other agent was not liable in repetition or damages.

2D DIVISION. **T**HE respondent, John Alison, a writer to the signet,
 Ld. Corehouse was instructed by Mr. Graham, the appellant, to recover payment of a debt due from Mr. Gray, who was heir of entail in possession of the estate of Carse, by adjudging his interest in the estate. In the summons he concluded for an adjudication “ of the life-rent of the said Charles

“ Gray, or whatever more extensive or valuable right stands vested in his person, or in the person of any trustee for his use or behoof, so far as not inconsistent with the conditions of the entail of the said estate.” It was executed under the direction of Colin Alison, a writer in the country, and transmitted by him to John Alison, to be proceeded with in common form; and decret was pronounced conform to the conclusions. John Alison, having soon after retired from business, committed the charge of the future proceedings to the other respondent, John Brown, who accordingly prepared the requisite deeds for completing a feudal title on the decret of adjudication,—the dispositive clause of the charter of adjudication being in terms conformable to the summons and decret.

Founding on this title, the appellant raised an action of reduction of certain securities in favour of other parties over the estate of Carse. He was met by an objection to his title to insist, that his decret of adjudication was insufficient to attach the estate, seeing that it did not adjudge the fee of the lands, but merely Mr. Gray’s life-rent right in them, Mr. Gray not being a life-renter, but a limited fiar, and that his charter of adjudication and infeftment were consequently inept as a title to challenge real securities. The Lord Ordinary (Newton), on 29th January 1828, pronounced this interlocutor:—“ The Lord Ordinary, having considered the summons and preliminary defences, with the productions made by the pursuer, and heard parties procurators thereon, finds that the dispositive clause of the pursuer’s charter of adjudication (which is precisely conform to the decret of adjudication on which it proceeds), in so far as it respects the entailed estate of Carse,

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“ does not convey the lands themselves, but ‘ usum
 “ ‘ vitalis redditus dicti Caroli Gray et quodcumque
 “ ‘ aliud jus vel interesse magis extensum vel pre-
 “ ‘ tiosum vestitum stans in ejus persona vel in persona
 “ ‘ alicujus amici fiduciarrii ut fidei commissarii in
 “ ‘ fiducia pro ejus usu et beneficio quantum non
 “ ‘ repugnat conditionibus talliæ,’ &c.: Finds that the
 “ conveyance of Mr. Gray’s life-rent was inept, he
 “ being no life-renter, but fiar of the lands, though a
 “ limited fiar; and that the addition of the indefinite,
 “ more extensive, and valuable rights which he might
 “ happen to be vested with, either in his own person
 “ or in that of a trustee for his behoof, is not such as
 “ could constitute a proper feudal estate in the pur-
 “ suer, or to warrant his infestment in the lands: Finds,
 “ that the precept which authorizes in general terms,
 “ ‘ Sasinam totarum et integrarum pefat. terrarum.
 “ ‘ decimarum et secundam formam et tenorem antedict
 “ ‘ cartæ nostræ,’ although a sufficient warrant for in-
 “ festment in the other lands and subjects directly con-
 “ veyed, was not such in regard to the entailed estate,
 “ as to which all that is granted is a right of life-rent
 “ which did not exist, or some more extensive right,
 “ the nature of which is left altogether undefined:
 “ Therefore, sustains the objections to the pursuer’s
 “ title, that he has no valid infestment or feudal estate
 “ in the tailzied lands; assoilzies the defenders; and
 “ decerns; but finds no expenses due.”

The Court having, on the 14th November 1828, adhered to this interlocutor, Mr. Graham brought an action of damages against the respondents, as having, by the inept manner in which they prepared his titles, occasioned his postponement to the heritable creditors

of Mr. Gray, and involved him in ineffectual litigation upon the faith of these titles. The respondents stated various grounds of defence; and in particular that the question as to whether the right of an heir of entail was that of a life-renter or a fiar was one of difficulty, and hitherto unsettled, and if the respondents had committed an error in law they ought not to be found liable in damages. The Lord Ordinary (Corehouse) pronounced this interlocutor (11th June 1830):—"The Lord Ordinary, having considered the closed record, and heard counsel for the parties, finds the defenders liable to the pursuer in repetition of the expense of expeding the charter and sasine on the decret of adjudication mentioned in the pleadings, in so far as it had been paid to them, or to Mr. Colin Alison for behoof of them or any of them; assoilzies them from all the other conclusions of the action; finds no expenses due; and decerns."

His Lordship at the same time issued this note:—"If the law laid down in Lord Newton's interlocutor of the 29th of January 1828 had been perfectly settled previous to that interlocutor, there might perhaps have been some ground for the claim of damages raised by the pursuer. But that is not the case, as appears from the judgment of the First Division, where his Lordship's interlocutor was reviewed, and still more from the deliberations of the Court on that occasion. It seems to have been held, then, that the adjudication itself, independently of the charter and infeftment which followed upon it, was a sufficient title to insist in the reduction brought by the pursuer, in which view the charter and infeftment, at the worst, were only superfluous. But farther, till

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“ that time the law with regard to a feudal title of the
“ nature in question was by no means clear. It is
“ certain that a life-rent, meaning thereby a usufruct—
“ for example, the courtesy, terce, or a life-rent granted
“ in life-rent use allenary, cannot pass to the effect of
“ being feudalized in the person of the disponent or
“ adjudger. In law language, inhæret ossibus of the
“ life-renter. But it is equally certain, that the right
“ of an heir in possession under a strict entail (which,
“ though often termed a life-rent, is not a usufruct,)
“ may be adjudged to that effect; and the question is,
“ what is the proper mode of doing so? Previous to
“ the decision in Sir William Nairne’s case in 1810,
“ the practice generally, if not universally followed,
“ was to adjudge, not the lands themselves, but the
“ interest of the heir in the lands, exactly as the
“ defenders did in the present case. This appears from
“ the form prescribed in the Juridical Styles, and the
“ fact is well known to every person who practised at
“ that period. Lawyers seem to have been apprehensive,
“ that if an adjudication of the lands themselves were made real, though limited in endurance
“ and extent, in the same manner as the heir’s fee, it
“ would infer an irritancy, and consequently defeat the
“ whole proceedings. In Sir William Nairne’s case
“ the point raised was not whether the disposition
“ granted by the heir of entail, and followed by infeftment,
“ was an irritancy, but whether, under the limitations introduced, it was or was not a real right in
“ competition with personal creditors. Since that
“ case, indeed, there has been an understanding that
“ the fee of an entailed estate may be disposed or
“ adjudged, and the right of the disponent or adjudger

“ feudalized without risk, the restrictions of the entail
 “ being inserted in his investiture. But it is thought
 “ that this has not yet been the subject of express de-
 “ cision ; nor, until the judgment of the Court in 1828,
 “ has it been found that the heir’s right, which is not
 “ of the nature of the usufruct, might not be adjudged,
 “ and a feudal title so completed, according to the old
 “ practice, without including the lands themselves in
 “ the adjudication. For, according to feudal principles,
 “ there is no right connected with land, except a usu-
 “ fruct, that may not be made real by infeftment, and
 “ in that form conveyed to a third party. Taking into
 “ view, therefore, the circumstances of this case, namely,
 “ the danger of an irritancy on the one hand, and the
 “ admitted practice on the other, it can hardly be main-
 “ tained that Mr. John Alison was to blame in following
 “ the course he did, in a matter in apicibus juris ; but
 “ if he was, there was no such culpa lata, or gross pro-
 “ fessional ignorance, as ought to subject them in
 “ damages to the pursuer.”

All parties reclaimed ; and the Court, on 4th Decem-
 ber 1830, assoilzied Brown and the representatives of
 Colin Alison, but found “ that the defender, John
 “ Alison, is liable in repetition of the expense of the
 “ charter and sasine, mentioned in the pleadings.” *

Against these interlocutors Graham appealed, and
 John Alison cross appealed.

Appellant.—The decree of adjudication, and charter
 of sasine following thereon, were blundered by the re-

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* 9 S. & D. p. 160.

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spondents. The error in the decree of adjudication is of such a description as to render the professional persons employed responsible for the consequences. An error having been committed, on account of which the appellant is entitled to demand reparation from those employed by him, there is sufficient evidence to attach that responsibility to all the respondents.

Respondents.—The decree of adjudication, with the charter and sasine which followed thereon, were prepared and expedite according to the usual and established forms, and, whether these forms shall be held correct or not, the respondents cannot be made liable in damages, merely for adhering to them. The claims now made by the appellant are inconsistent with the conclusions of his own summons, and there is neither legal ground, nor equitable principle, for holding Mr. John Alison responsible for any expenses connected with the charter or infestment in question.

LORD CHANCELLOR.—My Lords, the case of Graham v. Alison stood over for the purpose of further consideration. It respects the costs of certain legal proceedings referred to in the original appeal. Since the discussion, I have availed myself of the opportunity of further considering that case, and I would advise your Lordships to affirm the judgment. I had some doubt whether the Lord Ordinary was right in assailing all the defenders except John Alison, for I questioned whether John Alison ought not to have been assailed too; and I moved your Lordships, in consequence, that the case should stand for further consideration. I have since further considered it; I have had some

correspondence with the Learned Judges upon the subject; and the grounds of my doubt having been removed, the result is, that I have now come to a conclusion, that the Court below was right in making the exception of John Alison. I do not feel it to be necessary to say more upon this case, but will move your Lordships to affirm the judgment of the Court below, with costs to the respondents, as regards the original appeal.

The House of Lords ordered and adjudged, That the said original and cross appeals be and are hereby dismissed this House, and that the interlocutors, so far as therein complained of, be and the same are hereby affirmed: And it is further ordered, That the appellant in the said original appeal do pay or cause to be paid to the respondents in the said appeal the sum of 193*l.* 7*s.* 10*d.* for their costs in respect of the said appeal.

JOHN A. POWELL—JOHN BUTT and WILLIAMS—
BROOKS, POWELL, and BRODERIP, Solicitors.

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[7th August 1833.]

No. 36. The DUKE of ROXBURGHE and CURATORS, Appellants.
—*Solicitor General (Campbell)* — *Dr. Lushington*.

WILLIAM KERR, Respondent.—*Lord Advocate (Jeffrey)*
—*Murray*.

Warrandice—Teinds—Entail.—A titular and patron possessing under an unrecorded entail sold teinds, and bound himself and his heirs and successors to warrant them from all future augmentations—Held (affirming the judgment of the Court of Session), that the purchaser's successor was entitled, without discussing the heirs of line of the seller, to go against the heir of entail for relief of all augmentations subsequent to the sale.

1ST DIVISION. BY disposition dated the 11th August 1740 John
Lord Moncreiff. Duke of Roxburghe, patron and titular of the parish of Roxburgh, sold the teinds, great and small, of the lands of Sunlaws for 80*l.* 16*s.* Scots (being at the rate of six years' purchase,) to Christian Kerr of Chatto (the proprietrix of the lands), and to her heirs and assignees whatsoever, under the burden of the stipend then allocated on the same and payable to the minister of Roxburgh; but his Grace bound himself, "his heirs and "successors," to warrant the said teinds from any "future augmentations."

The estates, as well as the patronage and titularity,

were possessed under an entail executed in 1684, but which was not recorded in the register of tailzies till 1804. His Grace purchased lands in 1740, and entailed them in terms of the deed of 1648. He was succeeded by his son Robert, who renewed the entail in 1747. The present Duke made up titles under the entails of 1740 and 1747, which were also recorded in 1804.

Several augmentations since the date of the disposition were awarded to the minister of Roxburgh; in particular in 1800 an augmentation was laid on the lands of Simlaws to the extent of "B. 5. 2. 2½ meal," and in 1809 the same allocation was continued,—the interlocutor of the Court reserving a claim of relief against "the representatives of John Duke of Roxburghe." This augmentation was paid by the Duke in possession of the Roxburghe estates till 1820, when it was discontinued by the father of the present appellant. Robert Kerr, who was vested in the right of Christian Kerr, presented in a process of locality a claim for relief against the appellant as the representative of the granter; and Lord Moncreiff, on the 13th of November 1830, pronounced this interlocutor:—"The Lord Ordinary having considered the closed record on the claim of Robert Kerr, esq., of Chatto, against the tutors of the Duke of Roxburghe, and heard parties procurators thereon, Finds that the obligation of warranty against all augmentations of stipend contained in the disposition of teinds produced was not an obligation granted under any of the provisions of the statute in the process of sale, but a voluntary and apparently gratuitous undertaking by John Duke of Roxburghe, the granter thereof, for himself and his heirs and

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“ successors generally: Finds that the said obligation
 “ is not so constituted as to be attached as a real bur-
 “ den to the patronage or titularity of this parish, or
 “ to the teinds of the Duke’s own lands, or any other
 “ part of the entailed estate of Roxburghe; and that
 “ although, in consequence of the Roxburghe entail not
 “ having been recorded till 1804, any debt or obliga-
 “ tion contracted by the heir in possession may be
 “ eventually effectual to the creditor against the estate
 “ or the heirs of entail, any such obligation laid gene-
 “ rally on the heirs and successors of the granter can
 “ only operate as an ordinary personal obligation sub-
 “ ject to the general rules of discussion among heirs of
 “ various orders. And in respect that it clearly appears
 “ that there are other parties who represent universally
 “ the granter of the said obligation, and who, for any
 “ thing yet seen, the Lord Ordinary thinks ought to
 “ be first discussed according to the general rules of law:
 “ Finds that there are no termini habiles, or sufficient
 “ grounds in this process of locality for appointing that
 “ part of the stipend which, according to the ordinary
 “ rules of allocation, ought to be laid on the teinds of
 “ the claimant’s lands as held by him by heritable right,
 “ to be allocated on the teinds of any lands of the en-
 “ tailed estate of Roxburghe within the parish held
 “ necessarily by an equally available heritable title:
 “ Therefore finds that it is unnecessary and inexpedient
 “ to pronounce any judgment on the import and effect
 “ of the clause of warrandice in other respects; but
 “ repels the claim of Mr. Kerr in this process, reserving
 “ to him his claim of relief generally against all the
 “ representatives of the said John Duke of Roxburghe,
 “ and to them their answers thereto, and their rights of

“ relief among one another, as accords: Remits to the clerk to adjust the locality on the principles of this interlocutor: Finds no expenses due to either party.

“ *Note.*—Two things are to be observed in this case: 1. That the question could only have arisen on the supposition of the Duke of Roxburghe having no teinds in his hands as titular of this parish other than the teinds of his own lands possessed as heir of entail; and therefore that the real question in this process of locality is, whether the stipend otherwise allocable on Mr. Kerr’s lands shall be permanently imposed on lands of the estate of Roxburghe: 2. That it is impossible in this process to determine conclusively even the question of primary responsibility or discussion among the several heirs of the granter of the obligation; because, as the general representatives of the late John Duke of Roxburghe are not and cannot be parties in this process, the point cannot be effectually determined in their absence.”

The appellants reclaimed; and the Court pronounced this judgment, on 18th January 1831:—
 “ Alter the interlocutor of the Lord Ordinary reclaimed against, and find that under the obligation of the warrandice in question the claimant is not bound to discuss the heirs of line or the heirs whatsoever of John Duke of Roxburghe, the granter of the obligation, but is entitled to make his claim effectual at once against the present Duke of Roxburghe as the heir of entail; and with this finding remit to the Lord Ordinary to hear parties on the import and effect of the obligation in question, and to do farther in the cause as to his Lordship shall seem just; and find no expenses due.”

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The case returned to the Lord Ordinary, who pronounced the following interlocutor: — “ Sustains the
 “ claim of relief made by Mr. Kerr of Chatto, and
 “ remits to the clerk to rectify the locality accordingly :
 “ Finds the claimant entitled to the expenses incurred
 “ by him in making up the record, in so far as relates
 “ to the obligation of relief and the construction there-
 “ of, but excluding such part of the expenses as may
 “ have been incurred by the question of representa-
 “ tion,” &c.

Against this interlocutor, to which the Court adhered, the present appeal was brought.

Appellants.—The obligation of warrandice, being entirely of a general and personal nature, cannot be enforced against the appellant, the heir of entail, until the granter’s heirs of line have been discussed. It is incompetent, in the present process of locality, to depart from the course of procedure adopted in the previous localities of 1800 and 1809, by which the teinds of the respondent’s lands have been localled upon for their proper share of augmentation according to the ordinary rules of allocation, leaving him to seek in due and competent form any relief to which he may be entitled against the representatives of John Duke of Roxburghe.*

Respondent.—According to the established principles of teind law and the general character of the transaction, the respondent is entitled to relief in a process of locality from the party who has succeeded to the right of

* Erskine, b. 2. tit. 10. s. 38, and b. 4. tit. 40. sec. 24; b. 2. tit. 3. sec. 28; b. 3. tit. 5. sec. 17; b. 3. tit. 8. sec. 52.

patronage, in virtue of which character as patron the teinds originally belonged to the Roxburghe family. The appellant has succeeded to the right of patronage which gave the former Duke the titularity of the teinds; hence he is in the enjoyment of the subject or estate which gave the Duke the right to sell; and further, he has succeeded to that estate upon the right to which the necessity of selling in certain circumstances is laid. He enjoys, or at least might still enjoy, the price paid for the teinds, since it was due to the successors of the right of patronage.

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LORD CHANCELLOR.—My Lords, I shall crave your Lordships leave to have a little further time to look into one or two points, there having in this case been a difference of opinion among the learned Judges; the majority of the Court not agreeing with the very learned Lord Ordinary, and those learned Judges not concurring among themselves. It is impossible altogether to reconcile this judgment with the case of *Hamilton v. Nisbett*. I say nothing of *Hamilton v. Colebrook*; but decided by a variety of high authorities in the law, and particularly in the teind law, and decided recently, it appears extremely difficult to get over, though undoubtedly there is one difference between that case and this. I should wish, upon these grounds, to move your Lordships to postpone the judgment in this case.

His Lordship afterwards moved, and

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this

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House, and that the interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellants do pay or cause to be paid to the said respondent the sum of two hundred and fifty-five pounds seventeen shillings and sixpence for his costs in respect of the said appeal.

RICHARDSON and CONNELL—A. and R. MUNDELL,
Solicitors.

[16th August 1833.]

JOHN HAMILTON, Appellant.—*Lord Advocate (Jeffrey)—* No. 37.
Solicitor General (Campbell).

GEORGE BENNET, Respondent.—*Dr. Lushington—*
Murray.

Testament—Legacy—Trust.—Held (affirming the judgment of the Court of Session), that where a party had by a trust deed settled certain lands on one person, and left legacies to others, and provided for the sale of other lands for payment of the debts, legacies, &c., and to entail any residue that might be left, the legacies were not excluded by insufficiency of the fund provided for their payment, but were payable out of the trust estate generally.

JOHN OGILVIE was proprietor of the estate of 2D DIVISION.
 Gairdoch, of Carron House and lands adjacent, and of Lord Medwyn.
 Pockneave and Orchardhead. He executed a deed of settlement on the 11th August 1798, in favour of trustees, by which he conveyed to them those estates, and generally his whole heritable and moveable properties, among other purposes, for payment of certain specific annuities, legacies, and other provisions:—"Item, for
 " payment of all other annuities, legacies, or donations
 " which I may hereafter grant to any person or persons
 " by a regular deed, or by any writing, instruction, or
 " letter to my said trustees under my hand, at any time

No. 37. “ during my life, or even on deathbed.” “ Quinto. In
16th August “ order that my said trustees may sell, as I do hereby
1833. “ authorise and appoint them to sell, either by public
HAMILTON “ roup or private bargain, in their option, and in such
“ “ lots as they shall judge proper, and at such time or
BENNET. “ times as they shall think most advantageous for the
“ interest of the subjects, after proper advertisements in
“ the newspapers, the whole lands,” &c., enumerating
the lands specified in the deed, and appointed
them to sell out stock, &c. “ and to apply the price
“ of the said lands and others which are so ap-
“ pointed to be sold in payment of my debts and of
“ the legacies and donations herein-before mentioned,
“ and of all other legacies and donations which I may
“ hereafter grant,” &c. “ Septimo. In order that my
“ said trustees, after payment of the expenses to be
“ incurred in the execution of this trust, the debts due
“ by me, the provisions which in case of my marriage
“ I may leave to my widow and children, the legacies
“ and donations hereby granted, and all other legacies
“ and donations to be hereafter granted by me as
“ aforesaid, either by a regular deed, or by any writing,
“ instruction, or letter under my hand, may lay out and
“ employ the surplus, if any shall be, of my personal
“ estate and the produce of my land estate in the pur-
“ chase of lands, and thereafter make, grant, and
“ execute a valid and formal disposition and entail of
“ the lands so to be purchased, and of the whole residue
“ and remainder of my lands and estate and others
“ herein particularly and generally before mentioned,
“ which I hereby direct and appoint to be called in all
“ time hereafter the lands and estate of Gairdoch, to
“ and in favours of the heirs of my body, and their heirs

“ and assigns whatever ; whom failing, to and in favour
 “ of the said John Walker, cabinet maker in London,
 “ my cousin, and the heirs male of his body ; whom
 “ failing,” &c. to various substitutes of entail nominated
 or to be nominated, under burden of a jointure to his
 widow, and the annuities. Farther, “ I do hereby reserve
 “ to myself, not only my life-rent of the whole subjects
 “ hereby conveyed, but also full power and liberty to
 “ sell, use, and dispose thereof and burden the same at
 “ my pleasure, as well gratuitously as for onerous
 “ causes ; and also to cancel, revoke, alter, or innovate
 “ these presents at my pleasure at any time during
 “ my life, and even on deathbed.”

By a subsequent deed he appointed John Walker junior to be his successor in place of John Walker senior, who had died ; and he left the following among other written instructions : — “ On considering that Carron House with
 “ the grounds around on the north of the river are ap-
 “ pointed by my trust deed to be sold, as well as all the
 “ property on the south of Carron, for payment of all
 “ my debts and legacies or donations granted or to be
 “ granted, and that it may be proper and necessary to
 “ keep the house as at present with the gardens and
 “ pleasure grounds in proper order for a sale, and the
 “ furniture to remain in the house for such convenient
 “ time as the trustees may appoint ; and that I wish
 “ that John Walker, my cousin, in the Renfrew Bank,
 “ Greenock, his father being now dead in London, may
 “ get possession of the estates of Pockneave and
 “ Orchardhead at the first term of Martinmas after my
 “ decease ; and now intending that said John Walker
 “ should get the furniture of Carron House and farm-
 “ ing stock, &c., formerly meant to be sold for benefit

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“ of the trust estate; therefore I request my said trustees under my trust deed of 11th August 1798 to grant to the said John Walker, my cousin (as soon after my decease as they can find convenient to dispose of Carron House, &c. as above stated), all the furniture of every kind in Carron House,” with certain exceptions, by way of legacy and otherwise; —“ declaring hereby, that if my said trustees or the majority of their number shall find any painful difficulty in settling the donations above granted, I hereby authorize and empower the said trustees to sell off by public roup the whole subjects above named for the benefit of the trust estate under their charge.”

He afterwards gave other instructions, and in particular he stated this:—“ It is not my intention that any of the legacies be paid until the sale of Carron House and lands, &c. to procure the money, unless the sums ordered for the poor of the four parishes and mournings to the ministers there at my decease.”

Again, he stated,—“ In case it should happen that any of the creditors for lent money, as there will be but few unsettled accounts, should become impatient for payment before sales of the property be accomplished in a regular way to clear off my debts,” “ if money cannot be easily borrowed by the trustees on security of the lands to be redeemed at the sale, and which I hereby authorize the trustees to endeavour to do;—but if not obtained, I request they may sell immediately all of the lands on the south of Carron, including the feus and large granary of Grahamstoun, or as much as may be necessary to satisfy the demands, divided into lots for more convenience of sale, according to a particular state of the pro-

“ perty and supposed values, as here particularly referred to.”

After his death his personal property was found to amount to above 8,000*l.*, but his debts were of nearly three times that amount. The trustees did not succeed in selling the lands directed to be sold, and the Bank of Scotland, a creditor, brought a ranking and sale, under which lands to the extent of about 60,000*l.* were sold. Claims were lodged by legatees, and particularly by Bennet; and thereafter the common agent prepared a state and order of ranking, whereby he found “ that these legatees may rank upon the “ price of the lands which have been sold, posterior “ to the onerous creditors of Mr. Ogilvie, but cannot “ be allowed to rank upon the rents or price of those “ lands which, were ordered by Mr. Ogilvie to be “ entailed.”

Bennet and the other legatees objected to this ranking; and the Lord Ordinary, on 9th December 1831, pronounced this judgment:—“ Finds that the late Mr. Ogilvie of Gairdoch conveyed his whole heritable and “ moveable property to trustees, by a deed in 1798, for “ payment of his debts and certain annuities, legacies, “ and donations therein specified: ‘ Item, For payment “ ‘ of all other annuities, legacies, or donations which “ ‘ I may hereafter grant to any person or persons by a “ ‘ regular deed, or by any writing,’ &c.: That the trustees were authorized to sell certain parts of his heritable property specially enumerated, ‘and to apply “ ‘ the price in payment of my debts, and of the legacies “ ‘ and donations herein-after mentioned, and of all other “ ‘ legacies and donations which I may hereafter grant:’ “ That the deed farther provides, ‘that my trustees,

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No. 37. “ ‘ after payment of the expenses to be incurred in the
16th August “ ‘ execution of this trust and the debts due by me, the
1833. “ ‘ legacies and donations hereby granted, and all other
HAMILTON “ ‘ legacies and donations to be hereafter granted by me
v. “ ‘ as aforesaid, may lay out and employ the surplus, if
BENNET. “ ‘ any shall be, of my personal estate and the produce
“ ‘ of my land estate in the purchase of lands, and there-
“ ‘ after execute a valid entail of the lands so to be pur-
“ ‘ chased and of the whole residue and remainder of
“ ‘ my lands and others herein particularly and generally
“ ‘ before mentioned to and in favour of,’ &c. Besides
“ his life-rent, the truster reserved power to sell and
“ burden the subjects at his pleasure, as well gra-
“ tuitously as for onerous causes, and also to cancel,
“ revoke, or innovate the trust deed. Finds, that sub-
“ sequent to its date Mr. Ogilvie, by various codicils,
“ left instructions to pay legacies to various persons
“ who are now claimants: Finds the instructions to
“ entail the whole residue and remainder of his lands,
“ beyond those specially enumerated which were to be
“ sold, cannot be construed to imply a special pro-
“ vision or conveyance to the heirs of entail of specific
“ lands, entitling them to plead that it must be prefer-
“ able to general legacies; and although instructions
“ have not been given to sell lands sufficient for pay-
“ ment of these legacies, it must be presumed that this
“ has arisen from his not supposing that his personal
“ funds and lands sold would fall short of the sum
“ necessary for fulfilling all the purposes of the trust,
“ and not that it was with the view of preferring the
“ heirs of entail at all events, to the disappointment of
“ legatees subsequently favoured by him: Therefore
“ finds, that the legatees are entitled to payment out of

“ the trust estate, and the residue to be entailed is only
 “ after all the other purposes of the trust have been
 “ executed; and ordains the common agent to alter the
 “ order of ranking in terms of this interlocutor, and
 “ decerns.”

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The common agent reclaimed, and the Court (14th February 1832) having adhered he appealed.*

Appellant.—It is an undoubted rule of law that while general legacies of sums of money suffer abatement proportionally in consequence of the inadequacy of the fund out of which they are directed to be paid, a legacy of a specific subject must have full effect, provided that specific subject remains extant.†

The same rule is necessarily as applicable to bequests made through the intervention of a trust as to legacies made directly in favour of legatees. If a testator possessed of moveable property only, conveys the whole of that property to a trustee, directing that trustee to deliver over his plate to one person, his books to another, and his household furniture to a third, and at the same time to pay to other individuals certain sums of money, the trustee, in the event of a deficiency of funds for the payment of the pecuniary legacies, would not be entitled to sell the plate, or the books, or the furniture, in order to make up that deficiency. If the testator left no money, or no effects which his trustee was entitled to convert into money, the pecuniary legacies must remain unpaid. The same

* 10 S. & D. 330.

† Stair, book iii. tit. 8. sec. 40; book iv. tit. 35. sec. 4; Erskine, book iii. tit. 9. sec. 12.

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rule applies to a testator making a trust of heritable property. If after conveying his whole property to a trustee he directs that trustee to entail the estate of A. upon a certain individual, to sell the estate of B., and out of the price of the estate of B. to pay certain legacies in money,—although the testator may have over-estimated the value of the estate of B., and have left legacies to an amount greatly exceeding the price which could be realised by the sale of it, yet the specific provision of the estate of A. in favour of his heir of entail cannot on that account be disappointed.

The same principle is equally applicable to the present case.

By the trust deed Mr. Ogilvie conveys to the trustees his whole moveable property of every description, and also all his heritable property, not in general terms, but each part specially described.

Now, Mr. Ogilvie specially authorized those trustees to sell only a part of the heritable property thus conveyed to the trustees, for the purpose of paying his debts and the pecuniary legacies which he had bequeathed or might bequeath. He did not authorise a sale of the whole of the heritable property for these purposes, although for the payment of his debts a sale of the whole might have been compelled by judicial process. But he specially enumerates those portions of the property which the trustees were authorised to sell.

The heir of entail was, in one sense, and to a certain extent, a residuary legatee, inasmuch as he was entitled only to the residue of the price of the property appointed to be sold, after paying the debts and the pecuniary legacies. But in relation to the heritable property which was not authorized to be sold the heir of entail was the special

disponee of Mr. Ogilvie, unburdened with any debts, excepting in so far as the other funds might be insufficient to pay those debts, and certainly unburdened with any pecuniary legacies.

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Respondents.—According to the fair and legal construction of the trust disposition, it was the intention of Mr. Ogilvie to subject his whole estates, heritable and moveable, to payment of all his debts and legacies, and only to entail the residue after these objects had been fulfilled. The provision in favour of the heirs of entail was not therefore of the nature of a special legacy necessarily depending on the existence of any particular subject, but was truly of a residuary nature, and consequently that provision, as in the case of all residuary legacies, must be postponed in a competition with the other legacies.*

LORD CHANCELLOR. — My Lords, this case does not rest entirely upon the general principles, which are not in dispute, but upon the application to the individual case of those general principles. The question here is simply, Whether in this particular disposition and arrangement of the property conveyed by the trust deed, or deed of settlement as it is called, which was made, there was a specific disposition made of the real estate; or whether it is in the nature of a disposition only of what may be called the residue? My Lords, as there was a difference of opinion among the learned Judges of the Court below, I shall certainly move your Lordships

* *Authorities.*—*Erskine's Trustees v. Wemyss and others*, May 23, 1829, Fac. Col. ; and 7 S. & D. p. 594.

No.37. to grant time to consider this matter a little further
before pronouncing any opinion upon it.
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His Lordship afterwards moved, and

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondent the sum of one hundred and seventy-seven pounds for his costs in respect of the said appeal.

RICHARDSON and CONNELL — A. DOBIE, Solicitors.

[19th August 1833.]

JOHN GRIEVE (Waddel's Trustee), Appellant.— No. 38.
Dr. Lushington—Robertson—Sandford.

THOMAS WILSON, Respondent.—*Campbell—Wilson.*

Obligation—Error.—Circumstances in which it was held (affirming the judgment of the Court below) that an obligation to pay a debt was not founded on such error as was sufficient to set it aside.

IN 1807 Robert Waddel granted an heritable bond and disposition in security for 600*l.* to James Wilson over Liltycockee and Longridgemuir, in virtue of which Wilson was infeft; and having died, the right to it was acquired by the respondent. Waddel thereafter granted heritable bonds in favour of other creditors, which were followed by infeftment. And subsequently he executed a trust deed in the appellant's favour, for behoof of creditors, under which he was infeft. Wilson's bond contained a clause of sale in the usual terms, and in virtue thereof he took steps to bring the property to sale. The appellant attended the meeting fixed for the sale, and protested against it, and in consequence of the arrangement contained in the following letter it was adjourned:—“1st September
 “1820:—Sir, In consideration of your having ad-
 “journed the sale of Mr. Robert Waddel's lands of

2d Division.
 Lord Cringletie.

No. 38. “ Liltycockee and others contained in his bond to you
 19th August “ for 600*l.* sterling, and agreed to take the payment of
 1833. “ your said bond out of the price of Mr. Waddel’s
 GRIEVE “ lands when the same shall be sold by me, in virtue
 v. “ of a trust deed executed by Mr. Waddel in my favour
 WILSON. “ for behoof of his creditors in general, I hereby bind
 “ myself as trustee foresaid to pay to you the said sum
 “ of 600*l.* out of the first of the price of any part of
 “ Mr. Waddel’s lands that shall obtain soonest a pur-
 “ chaser; and till the recovery of such price I agree
 “ and bind myself as trustee foresaid to pay you the
 “ interest due to you at the regular terms according to
 “ your bond. I shall likewise pay you at Martinmas
 “ next the expenses you have hitherto incurred in
 “ offering the said lands for sale, &c.; and farther, in
 “ case you shall be desirous of receiving your money
 “ before the lands can be sold, I promise to do what I
 “ can to obtain it for you upon a transference of your
 “ security. I am,” &c.

The appellant having been urged by the respondent for a partial payment, wrote to the agent of the latter as follows:—You may please send me your client’s bond and infestment, &c.; and if the agent to whom I shall show it shall be satisfied with the title, and your client be willing to bear the expense of an assignation, I can now obtain you payment of the whole debt; or if any unexpected obstacle arise to prevent this, I shall pay from 150*l.* to 200*l.* to account upon receiving a proper acknowledgment, with an obligation to assign the security to that extent, if required, at your client’s expense; provided, on seeing your client’s title, I shall find myself in safety to do this.”

The titles were transmitted to the appellant by the

respondent's agent, accompanied by the following letter:—“ From a perusal of these writings you will find Mr. Wilson's title to the bond complete, and with the validity of which I presume you will be satisfied. After examining the papers, I wish you to write me what the neat expense of the proposed assignation will be, and to say if you will cause R. Waddel bear a part. I have no objections that Mr. Wilson be at the expense of the assignation and the stamps for the infestment, but I do really think it would be exceedingly hard to ask more.”

The appellants wrote in answer to the respondent's agent:—“ Having put into the hands of the agent for the gentlemen from whom I proposed to obtain money, upon an assignation to the security held by your client Mr. Wilson over the lands of Liltycockee and Longridgemuir, the title deeds of that security, he observes that sasine given upon the bond by Robert Waddel to James Wilson is informal. The person mentioned in the instrument as bailie having been absent when the infestment was taken, an attempt has been made to supply this defect by the following words written at the bottom of the deed; ‘ Robert Waddel of Burnhead in my praisance, and bailie in absince of H. Smith.’ This marking is not referred to in the doquet of the notary, nor is it authenticated as the handwriting of Robert Waddel; for which and other reasons the agent alluded to considers the instrument to be irregular, and that in fact there is nothing more than a personal security to come in competition with the other creditors of the granter of the bond. He therefore declines advancing the money, and for the same reason I must

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No. 38. “ also decline making any payment to account from my
 19th August “ own funds till the defect has been obviated.”
 1833. The interest had hitherto been paid by the appellant ;
 GRIEVE but after the defect was discovered the payment was
 v. qualified by a declaration, that it should not invalidate
 WILSON. any legal objection to the respondent's titles.

The respondent then brought an action against the appellant for payment of the sum contained in the bond under deduction of the sum paid to account ; and the appellant raised a counter action for reduction of the instrument of sasine, and the letter of obligation, and for repetition of the sum paid to account, on the ground that “ the foresaid letter of obligation was granted by “ the said John Grieve, trustee foresaid, upon the “ understanding that the said Thomas Wilson held a “ valid and preferable heritable security over the lands “ before mentioned ; that the said Thomas Wilson re- “ presented to the said John Grieve and made him “ believe that he held such valid preferable heritable “ security ; and it was only upon this understand- “ ing that the said John Grieve agreed to come “ under and did grant the foresaid letter of obligation. “ That as the said Thomas Wilson did not at the “ time hold a valid heritable security to the said sub- “ jects, and as the writs bearing to constitute the said “ heritable security are null and void, and as the said “ letter of obligation was granted in consequence of “ misrepresentation, and from a misunderstanding of “ the true state of the fact, and as there is therefore “ an error in substantialibus, the said letter of obligation “ is null and void.”

The Lord Ordinary reported the question both as to the validity of the sasine and the letter of obligation to

the Court, accompanied by this note: "As it is admitted that Hume Smith, who is said to have acted as bailie in the body of the instrument of sasine, to which alone the notary's doquet applies, was not so much as present, and the sasine is recorded in the register of sasines as a false instrument, no notice being taken in the register of the addition at the foot of the pages of the sasine said to have been made by Robert Waddel, the Lord Ordinary is clearly of opinion that the sasine is null and void, and therefore, if the letter by the trustee Mr. Grieve to Mr. Wilson, 1st September 1820, and the proceedings following thereon had been out of the way, the Lord Ordinary could have had no hesitation in reducing the infestment, and finding that it conferred on Mr. Wilson no right of preference to payment in competition with Mr. Waddel's other creditors; and, indeed, the Lord Ordinary has no difficulty of being of that opinion in so far as any right of preference is constituted by the infestment. His only doubt arises from that letter which was granted by Mr. Grieve, as trustee for the creditors, binding himself quâ trustee to pay Mr. Wilson in full in consideration of his postponing the sale of the lands in his bond and sasine, which he had then regularly brought into the market, and to allow the sale of these parts of Mr. Waddel's estate to be included in the sale of the rest. Mr. Grieve indeed says, that when he gave this letter he had not seen Mr. Wilson's bond and sasine; but this was his own fault, since they were lying on the table in the room, as the warrant under which the lands were to be sold. On the other hand it may be said that Mr. Wilson lost

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“ nothing by desisting from the sale, since the purchaser would not have paid the price until he got a sufficient title, which Mr. Wilson could not have given him ; or, at least, if the bond without the sasine could be held to constitute a sufficient mandate to sell, which the Lord Ordinary inclines to think it did, still Mr. Wilson would have had no preference over the other creditors of Mr. Waddel, and therefore, losing nothing by the delay of the sale, is not entitled to insist for payment in virtue of his letter. The case, being complex and uncommon, appears to the Lord Ordinary to be proper for being laid at once before the Court.”

The Court sustained the reasons of reduction as to the sasine, but remitted the other point to the Lord Ordinary. Thereafter his Lordship on 28th November 1826, issued this note :—“ The Lord Ordinary formerly made avizandum with this case to the Court, and ordered memorials to be prepared for their Lordships, on account of the difficulty arising out of the effect of Mr. Grieve’s letter to Mr. Wilson, 1st September 1820, obliging himself quâ trustee unconditionally to pay to Mr. Wilson the full amount of his debt ‘out of the first of the price of any part of Mr. Waddel’s lands that shall obtain soonest a purchaser,’ and the event of the sales having proved that there was not sufficiency of funds to pay his debt in full with those due to the other creditors. Mr. Wilson pleaded also on his heritable bond and infestment entitling him to full payment ; but on this right of preference the Lord Ordinary, having no doubt, expressed his decided opinion that the sasine was null, and bestowed no right of preference independently of the letter, and he hoped that the Court would have decided both

“ points; but the Lord Ordinary has to regret that
 “ they have deferred to him the task of giving his single
 “ judgment on the point which he referred to their
 “ united wisdom. They (25th November 1825) con-
 “ firmed his opinion of the sasine; their Lordships,
 “ have found it void and null, they reduced it, and
 “ remitted the other points of the cause to him to be
 “ disposed of. In obedience then to this remit, he has
 “ attentively reconsidered the cases for both parties
 “ with the whole proceedings. He looks upon it as a
 “ point of law well understood, that where two con-
 “ tracting parties are in error about the essentials of a
 “ contract it must be void and null; and the Lord
 “ Ordinary felt all the difficulty arising out of the fact,
 “ that Mr. Wilson and Mr. Grieve both were satisfied
 “ that Mr. Wilson had an infeftment affording him a
 “ preference for payment of his full debt of 600*l.*;
 “ whereas it has been decided that the sasine is void and
 “ null, so that it may be thought that there was an error
 “ in both parties relative to the subject of the contract,
 “ which may render it void. But there are other con-
 “ siderations which must be kept in view: had parties
 “ entertained the idea that Mr. Waddel’s estate and
 “ funds were insufficient for payment of his debts, then
 “ it might well be admitted that no other idea could
 “ have actuated Mr. Grieve, when he obliged himself
 “ to pay Mr. Wilson’s debt in full, than that he had a
 “ right of preference to full payment. But this is not
 “ the truth; for Mr. Grieve’s idea was, that Mr. Wad-
 “ del’s estate was worth considerably more than his
 “ debts, as is proved by the protest taken against the
 “ sale when about to be made by Mr. Wilson. He there
 “ gives, as one of the reasons of his protest,—‘ Because

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“ ‘ the trust estate conveyed to the said John Grieve as
 “ ‘ trustee aforesaid is greatly more than sufficient to pay
 “ ‘ all the debts of the said Robert Waddel.’ Mr.Grieve’s
 “ reason, therefore, for preventing the sale and obliging
 “ himself to pay Mr. Wilson’s debt in full no way
 “ arose from the idea alone of the latter having a pre-
 “ ferable security for his money; because whether he
 “ had a preference or not was of no importance, seeing
 “ there was a fund sufficient to pay all Waddel’s debts.
 “ Mr. Grieve’s idea probably was, that if Mr. Wilson
 “ sold the lands and paid himself, the commission due
 “ to the trustee might pro tanto be diminished. But
 “ whatever were his motives, the Lord Ordinary cannot
 “ hold that there was an essential error in the subject
 “ matter of the contract. Mr. Wilson had a mandate
 “ to sell, which would have been good had there been
 “ no sasine. If the warrant had been broad enough
 “ he might have sold Mr. Waddel’s whole estate, and
 “ had he raised a price sufficient to pay all the debts of
 “ that person, he might have handed it over to the
 “ trustee Mr. Grieve, and called on him to denude,
 “ which he must have done. It was to prevent a sale
 “ that Mr. Grieve, in the full belief that there were
 “ exuberant funds to pay all the debts, granted the
 “ letter which gives rise to this question, and conse-
 “ quently the Lord Ordinary cannot hold that the
 “ letter was granted on the sole ground that Mr. Grieve
 “ believed Mr. Wilson’s heritable bond and infestment
 “ to be entitled to a preference to the claims of his
 “ co-creditors. The Lord Ordinary feels the force of
 “ the question put by Mr. Wilson, and which no man
 “ can now answer: viz. ‘ who can tell whether, if I had
 “ ‘ been permitted then to sell, the land would not have

“ ‘ yielded the expected price ? ’ There can be no answer
 “ to this, except from presumption ; which is, that the
 “ expected price would have been obtained, since the
 “ trustee thought that Mr. Waddel’s estate would after
 “ paying his debts leave a reversion ; and the conclu-
 “ sion from that is, that Mr. Wilson would have got
 “ full payment. To all this it is no answer that the
 “ lands sold afterwards at the distance of years for less.
 “ Time and circumstances operate changes, of which
 “ Mr. Grieve must be held to have taken his chance.
 “ Neither is the Lord Ordinary moved with the idea
 “ that the obligation was granted by Mr. Grieve
 “ quâ trustee. If it was an obligation that he was
 “ entitled to give quâ trustee, it will bind his con-
 “ stituents ; if not, he must perform it personally.
 “ Mr. Wilson was entitled to trust that Mr. Grieve
 “ knew his own powers, and to rely on his unqualified
 “ obligation. As the Court have done the Lord Ordi-
 “ nary the honour to defer back to him the decision of
 “ this part of the cause, he has thought it incumbent on
 “ him to explain his views.” His Lordship at the same
 time pronounced this interlocutor :—“ For the reasons
 “ expressed in the prefixed note repels the defences in
 “ the action at Thomas Wilson’s instance against John
 “ Grieve, and decerns against the said John Grieve for
 “ payment to said pursuer of 300*l.*, with the legal in-
 “ terest thereof since the term of Whitsunday 1822 ;
 “ assoilzies him of course from all the other conclusions
 “ of the action of reduction at the instance of the said
 “ John Grieve against him, except from that which has
 “ been already decided by the Court, namely, that the
 “ sasine in favour of the said Thomas Wilson is void and
 “ null ; finds Mr. Wilson entitled to the expenses of dis-

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No. 38. "cussing this point relative to the effect of Mr. Grieve's
 19th August "obligatory letter to him, that is, since the 25th day
 1833. "of November 1825, but to no other expenses, and
 GRIEVE "remits to the auditor of Court to tax the same."
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Against this interlocutor, to which the Court adhered,
 Mr. Grieve appealed.

Appellant.—The Court of Session, in pronouncing the judgment appealed against, proceeded upon an erroneous view of the right existing in the person of the respondent, and this error is a prominent feature in the reasons assigned by the Lord Ordinary in support of his judgment. It was considered that the respondent had, at the time when the transaction took place between him and the appellant, a power of sale which might have been used for the payment of his debt notwithstanding the trust deed in favour of the appellant, and that this right was given up in consequence of the obligation to pay the amount of his bond from the proceeds of the estate when sold by the trustee.

But this is an assumption of the whole case: it is assumed, in the first place, that the respondent was entitled to sell the lands, and, in the second, that the proceeds would have been sufficient to liquidate his debt as well as that of all the other creditors, heritable and personal. But the power of sale did not exist, and even the mandate to sell was unavailing in competition with the appellant's infestment. Neither does the respondent venture to assert that a larger price could have been obtained for the lands if they had been then sold than what they actually brought. There are, therefore, no relevant reasons stated for eliding the plea of the ap-

pellant, that the obligation was granted under a fundamental error, or rather a misrepresentation by the respondent, that he held a valid and effectual real security, which it has been decided he did not.*

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Respondent.—The obligatory letter bears to have been granted not on the faith of the infestment on the heritable bond being valid, but in consideration of the respondent “having adjourned the sale of Mr. Robert Waddel’s lands of Liltycockee and others contained in his bond, and agreed to take payment of his said bond out of the price of Mr. Waddel’s lands, when the same should be sold by the appellant in virtue of his trust deed.” Had the appellant deemed the validity of the infestment at all material he had a full opportunity of ascertaining the fact, and he was bound, and indeed must be presumed, to have examined it, if he conceived that the transaction into which he was entering was in any respect dependent on its validity. But that transaction was altogether independent of the infestment, and there was evidently no error in substantialibus of the contract. To constitute an error in substantialibus, so as to entitle a party to insist on his contract being rescinded, it must have been an error regarding the nature and essence of the thing gained or acquired. But this cannot be alleged in the present case, because all that the appellant was desirous to procure was an abandonment of the sale; and the sale having been abandoned by the respondent, he obtained all the benefit for which he stipulated, and for which he agreed to make payment

* *Authorities.*—Bell, vol. ii. p. 335; Steven and others v. Fleming, Feb. 19, 1811, Fac. Col.; Erskine, b. 3. tit. 3. s. 40.

No.38. to the respondent out of the first of the price of any
19th August part of Mr. Waddel's property. Nor could the ap-
1833. pellant have procured this advantage on any other
GRIEVE terms, though he had not merely known but pleaded
WILSON. the nullity of the infestment; for the respondent's power
of sale was not contained in the infestment but in the
bond itself, which has not been reduced, and that power
must have been executed by him as Mr. Waddel's man-
datory, in which character he could have made a valid
sale without any infestment at all.

And even if infestment had been necessary, the respon-
dent's sasine would have completely answered his purpose
had the sale been permitted to take effect; for the
articles of roup declared " that the purchaser shall be
" understood to have satisfied himself with the suffi-
" ciency of the said progress and title deeds previous
" to the roup, and shall not be entitled to quarrel the
" same thereafter upon any ground whatever."

Nay, the respondent could have taken a new in-
festment before a sale of the lands was effected, and
thereby secured to himself full payment by a preference
over all the personal creditors for whom the appellant
acted, had the appellant not rendered it unnecessary for
him to do so by granting the obligatory letter. The pre-
vious infestment upon the trust deed in the appellant's
favour was no bar to the respondent taking a new infest-
ment to this effect; for that deed conveyed the lands to
the appellant for the payment of the truster's creditors
in general, but without specifying either their names or
the amount of their debts; in consequence of which it
could not have made the debts of these creditors real
burdens on the lands, although it had been intended
to do so. The respondent, however, gave up that benefit

on receiving the obligation of the appellant; and that being the case, the appellant cannot get quit of his obligation now, when a new infestment is entirely barred by the infestment of the purchaser.*

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LORD LYNTHURST.—I move your Lordships, in the case of *Grieve v. Wilson*, that the judgment be affirmed.

LORD WYNFORD.—My Lords, I was in hopes that I should have heard stated by my noble and learned friend the grounds on which he moves the affirmance of the judgment. This case was argued a considerable time ago. I applied my mind at that time, and I have since applied my mind, to the consideration of this case. Every time I have taken up the papers it has so happened I have come to the same conclusion, that this judgment ought not to be affirmed, but to be reversed. My Lords, the facts not having been stated to your Lordships, I will take the liberty of stating them. This is a case in which proceedings were had for the purpose of setting aside an agreement, which I will read to your Lordships. The agreement is contained in a letter, which bears date on the 1st of September 1820. (His Lordship then read the letter quoted, p. 543.) Your Lordships perceive, therefore, this is an agreement, the consideration for which is the adjourning the sale of certain lands, in consideration of which he undertakes to pay 600*l.* out of

* *Authorities*.—Bell's Com., vol. i. p. 586-7-8, 4th ed.; Erskine, b. ii. tit. 3, sec. 50, Bell's Com., vol. i. p. 588; *Stenhouse v. Innes*, Feb. 21, 1765; Mor. 10264; *Broughton v. Gordon*, June 20, 1739; Mor. 10247 and 10248; *Chalmers v. Mackenzie of Redcastle's Creditors*, Jan. 27, 1792; Bell, 404; *Douglass of Dornoch's Creditors* (not rep., vide Bell's Com., vol. i. p. 588, note 2, sec. 4); Bell, vol. ii. p. 584 and 582, and Com. p. 641, *Macadam's case*; Wight, p. 282, *Campbell v. Speirs*, Feb. 14, 1790; Mor. 8652 (affirmed); *Anderson v. Matheson*, Dec. 14, 1818, Fac. Col.; Erskine, b. ii. tit. 3, sec. 50.

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the first proceeds of the estate. The situation of these parties at the time of this contract was this:—The respondent, the person who had the judgment of the Court below, was supposed to have had a deed enabling him to give a complete right over a part of this estate, and it was thought the sale of that part would be injurious to the sale of the remaining part. The appellant was at that time a trustee of the whole of the estate, and he considered that the estate of which he was trustee would be injured, believing this conveyance to be in the possession of the respondent, and therefore he made the bargain which is expressed in this letter, to pay 600*l.*, under the supposition — and I believe both parties so conceived — that the respondent was in possession of a valid charge upon that estate. Now, my Lords, it turned out on inquiry that it was no charge upon the property at all. I admit it might have been made a legal charge by a regular process had in Scotland; but if it had been made a legal charge, it must have been made a legal charge which would have ranked to claim upon the estate after the deed under which the appellant was trustee; and the respondent would have made nothing of that legal charge, for the whole proceeds of the estates were only equal to the satisfaction of the creditors, of whom the appellant was trustee. The great object of the appellant was to stop the sale, he thinking that the respondent had a legal charge upon the estate, which would take precedence of the charge he had in his character of trustee. Now, as I have stated to your Lordships, that certainly could not have been the case, for there was a defect in the instrument of which the respondent was in possession, which might have been rectified; but however rectified, the person claiming

under that deed could only come in to claim after the creditors, under the deed which had been executed to the appellant, and which he held as a trustee for several of the creditors. My Lords, when it was discovered that that was the situation of the parties—that, in fact, the appellant derived no advantage from the agreement—the question arose, whether the contract was not void. If a contract be voidable, it may be set up by some circumstances, or it may be affirmed by subsequent conduct; but it is the law on each side of the Tweed, that if it be absolutely void it cannot be set up again by any circumstances which occur. The grounds upon which the decision in the Court below went are stated in the interlocutor of the Lord Ordinary, which I will read to your Lordships,—the judgment of the Court above having merely affirmed the judgment of the Lord Ordinary :—“ The Lord Ordinary formerly made avizandum with this case to the Court, and ordered “ memorials to be prepared for their Lordships, on account of the difficulty arising out of the effect of “ Mr. Grieve’s letter to Mr. Wilson, 1st September “ 1820, obliging himself quâ trustee unconditionally “ to pay Mr. Wilson the full amount of his debt out “ of the first of the price of any part of Mr. Waddel’s “ lands that shall obtain soonest a purchaser, and the “ event of the sales having proved that there was not “ sufficiency of funds to pay his debt in full, with those “ due to the other creditors. Mr. Wilson pleaded also “ on his heritable bond and infeftment entitling him “ to full payment; but on this right of preference “ the Lord Ordinary, having no doubt, expressed his “ decided opinion that the sasine was null, and bestowed “ no right,”—so that your Lordships see these parties

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No.38. were under a mistake with respect to the effect of that
 19th August deed,—“ and bestowed no right of preference indepen-
 1833. dently of the letter, and he hoped that the Court
 GRIEVE “ would have decided both points ; but the Lordordi-
 v. nary has to regret that they have deferred to him
 WILSON. “ the task of giving his single judgment on the point
 “ which he referred to their united wisdom. They
 “ (25th November 1825) confirmed his opinion of the
 “ sasine;”—that is, they declared the sasine void—
 “ their Lordships have found it void and null; they
 “ reduced it, and remitted the other points of the cause
 “ to him to be disposed of. In obedience then to this
 “ remit, he has attentively reconsidered the cases for
 “ both parties, with the whole proceedings. He looks
 “ upon it as a point of law well understood, that where
 “ two contracting parties are in error about the essen-
 “ tials of a contract, it must be void and null.” My
 Lords, it is on the ground here stated that I am of
 opinion that this learned Judge, to whose opinion I am
 referring, is erroneous in the conclusion to which he has
 come; for, if there be an error in the essentials of a con-
 tract, it must be null and void ; therefore I feel it my
 duty to satisfy your Lordships, which I trust I shall
 shortly do, that if there is an error in the essentials of
 this contract it is null and void, and cannot be set right.
 He goes on to say,—“ And the Lord Ordinary felt all
 “ the difficulty arising out of the fact, that Mr. Wilson
 “ and Mr. Grieve both were satisfied that Mr. Wilson
 “ had an infestment affording him a preference for pay-
 “ ment of his full debt of 600*l.* ; whereas it has been
 “ decided that the sasine is void and null, so that it
 “ may be thought that there was an error in both par-
 “ ties relative to the subject of the contract, which may

“ render it void. But there are other considerations,” says the learned Judge, “ which must be kept in view. Had parties entertained the idea that Mr. Waddel’s estates and funds were insufficient for payment of his debts, then it might well be admitted that no other idea could have actuated Mr. Grieve when he obliged himself to pay Mr. Wilson’s debt in full than that he had a right of preference to full payment. But this is not the truth ; for Mr. Grieve’s idea was, that Mr. Waddel’s estate was worth considerably more than his debts, as is proved by his protest taken against the sale when about to be made by Mr. Wilson. He there gives us one of the reasons of this protest,—‘ Because the trust estate conveyed to the said John Grieve, as trustee foresaid, is greatly more than sufficient to pay all the debts of the said Robert Waddel.’ Mr. Grieve’s reason, therefore, for preventing the sale, and obliging himself to pay Mr. Wilson’s debt in full, no way arose from the idea alone of the latter having a preferable security for his money ; because whether he had a preference or not was of no importance, seeing there was a fund sufficient to pay all Waddel’s debts. Mr. Grieve’s idea probably was, that if Mr. Wilson sold the lands and paid himself, the commission due to the trustee might pro tanto be diminished.” My Lords, I think this is really uncharitable reasoning, under the circumstances ;—“ But whatever were his motives, the Lord Ordinary cannot hold that there was an essential error in the subject matter of the contract. Mr. Wilson had a mandate to sell, which would have been good had there been no sasine.” I have stated to your Lordships, that it would have been good if it had

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been made perfect, but that even, when made perfect after the other instrument, it would have been good for nothing ; for the trustee under the other deed exhausting the whole of the estate, there would have been nothing left to satisfy this. Now, your Lordships perceive it is here admitted by this learned Judge, that if there be a material error in substantialibus the deed is altogether void. Let us see, then, whether there was not error in substantialibus. Lord Stair has expressed the same opinion more strongly than this learned Judge. Lord Stair, who is, as your Lordships know, the highest authority in the Scotch law, says : “ Those who err in “ the substantials of what is done contract not.” It does not mean that there must be an error in every part ; it is abundantly sufficient if there be a sound, important, and material error. Now, I submit to your Lordships, whether the parties in this case did not act entirely in error in a material part ; if they were in error in a material part, that is enough. Is not that the case with respect to this instrument ? In consequence of this error, this instrument was of no use whatever to the persons concerned. It has been said, it might have been of use if the sale had proceeded immediately, though he could not have had the proceeds of that sale until the creditors had been satisfied ; and that, if the trustee had thought fit to proceed immediately, the estate might have produced enough to have satisfied all. Now it is extraordinary that should be stated, when we consider that this instrument was executed only in the month of September 1819. In a very few months after this attempts were made to sell different parts of this property, but no sales could be made ; there is, therefore, no pretence, in my opinion, for saying that. Is it just then

that the appellant should be called upon to pay this 600*l.*, which must, if paid by him, come out of his own pocket, when it is apparent that his conduct could not be dictated by motives of private interest, but was done entirely for the purpose of making the best for his principal, after several attempts made to sell? It appears that no such price could be obtained for this property as would have been sufficient to have paid the creditors under the trust deed; and if it would not have paid the creditors under the trust deed, no benefit could by possibility result from this agreement. Then, if that be so, why is the respondent to put into his pocket 600*l.* taken out of the pocket of Mr. Grieve, when he could not have got six hundred halfpence if this agreement had not been made? Is not this an error in substantialibus? I submit to your Lordships that it is. My Lords, if the parties fall into a material error, though not from fraud, but from mere mistake, that, according to the law of Scotland, and I believe the law of England, (but with that we have nothing to do now,) but according to the authority of Lord Stair, that is sufficient to render the instrument void. Is this then a material error? If a man thinks there is a valid charge on land, and it turns out no charge at all, and, in point of fact, every other creditor is to be let in before the particular person who makes it,—if that be not an error in substance, I confess my mind is incapable of understanding what an error in substance is. I shall trouble your Lordships no further upon this subject, but by a reference to an opinion of Mr. Bell's, a very eminent writer, as your Lordships know, upon the law of Scotland, which appears to me very important upon this subject, to show what is the effect of this error. “Where the security,” says

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Mr. Bell, “ is not accompanied with a transference of
 “ the full feudal right, but is in the nature of a mere in-
 “ cumbrance, or burden by heritable bond, the power to
 “ sell is a mere mandate ; and although it is an irrevoca-
 “ ble mandate, and in the nature of a procuratory in rem
 “ suam, which will entitle the creditor to proceed, if not
 “ interrupted by the other creditors, yet, where there are
 “ other creditors holding secondary securities, or pro-
 “ ceeding in bankruptcy, the title which can be conferred
 “ under the mandate is so questionable that a full price
 “ will not be obtained. The purchaser may indeed ac-
 “ quire a feudal title, but it must be under burden of the
 “ heritable debts constituted by infestment ; and there
 “ seems to be no secure limit to the burden, since, first,
 “ the purchaser has not the benefit of the sequestration
 “ act limiting real burdens to the amount of the price ;
 “ and, secondly, the price offered at the sale cannot, at
 “ any rate, be a good criterion of value, as the subject is
 “ sold on a questionable title.” My Lords, Mr. Bell
 refers to a case in support of his opinion, which it is
 material also to mention to your Lordships. He says,
 “ In September 1800 Brown granted an heritable
 “ bond of annuity to M’Neill, on which infestment was
 “ regularly taken. The creditors under the two first of
 “ these bonds proceeded in January 1802, long after
 “ the term of payment in their bonds, to sell the lands
 “ (with the knowledge of Fleming, trustee for Brown).
 “ Steven purchased at the sale, and paid the price to
 “ M’Dougal, holding the second security, with consent
 “ of Glen and Currie, who held the first. He received
 “ a joint disposition from them, was infest, and took
 “ possession. In 1803 M’Neill, holding the third

“ security, raised an action of mails and duties. No
 “ intimation had been given to the purchaser not to pay
 “ to M'Dougal, Glen, and Currie. The purchaser
 “ produced his titles in the mails and duties as exclu-
 “ sive. The sheriff found M'Neill entitled to the
 “ reversion of the subject, after deducting the two prior
 “ debts. The case was advocated, and Lord Robertson
 “ found that Brown had not been divested by the prior
 “ heritable bonds, and that consequently the posterior
 “ bond of annuity became a burden on the property,
 “ which could not be disappointed by the sale. The
 “ purchaser reclaimed, but the Court adhered.” This
 shows, in the clearest and most satisfactory manner, that
 this instrument, which had been the subject of the pur-
 chase to which I have adverted, gave no priority in
 title; for they could not obtain any fruits of it until all
 the creditors upon the estate were satisfied, and there
 was not sufficient to satisfy the prior claims. My Lords,
 if these parties were not in error on a most material
 point, I do not know what a material error is. For
 these reasons I am humbly of opinion this judgment
 ought to be reversed, inasmuch as, in consequence of
 the error into which these parties fell, the appellant
 agreed to pay 600*L.*, which he must pay, if at all, out of
 his own pocket.

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LORD CHANCELLOR.—My Lords, it is now a con-
 siderable time since this case was first heard before your
 Lordships. I had proposed more than once to have
 moved your Lordships to proceed to judgment, but it
 was delayed by different circumstances. It was the first
 case I heard after I had the honour of a seat in your

No. 38. Lordships House. I formed at the time a very clear and decided opinion upon the case, but I was prevented by the circumstance of my sitting as speaker, and not having taken my seat, from stating any reasons for the judgment which I thought it my duty to propose. Nevertheless afterwards, on the case being called on for the judgment of your Lordships, I did state explicitly the grounds of the opinion I had formed, and not differing in some respects from my noble and learned friend as to the general doctrine of law, but stating that in my opinion a different conclusion was to be drawn from the special circumstances forming part of the facts of the case, I proposed to affirm the judgment below. The difference between us arose out of the impression which those circumstances produced, having stated to your Lordships my opinion; but upon that occasion finding, which I was not previously aware of, that my noble and learned friend differed with me, I did not then desire your Lordships to proceed to judgment; but the case stood over, and was afterwards heard by one counsel on a side, and at my request my noble and learned friend the Lord Chief Baron (Lord Lyndhurst) attended the hearing with us. The result was that the argument did not at all change my opinion. I had the benefit also of hearing the opinion of my noble and learned friend who has just addressed your Lordships, and those reasons which influenced his mind (for he was kind enough, with his usual courtesy, to state them to me privately). I have since deliberately considered the arguments which have been adduced, and I certainly agree in the judgment which has been moved by my noble and learned friend in the first instance. My Lords, considering the

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difference of opinion which exists in your Lordships
House in relation to this case, I think the judgment
ought to be affirmed without costs.

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The House of Lords ordered and adjudged, That the
said petition and appeal be and is hereby dismissed this
House, and that the interlocutors therein complained of be
and the same are hereby affirmed.

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SPOTTISWOODE and ROBERTSON — ALLISTON and
Lock, Solicitors.

[24th August 1833.]

No. 39.

WILLIAM EWING, Appellant.—*Lord Advocate*
(*Jeffrey*).

Mrs. HELEN M^cKENZIE or CULLEN, Respondent.—
Jervis.

Reparation.—Certain judicial statements alleged to be slanderous, held (reversing the judgment of the Court of Session) to be privileged, unless it was proved that the party using them did so from motives of malice, and did not believe them to be true; and a remit made to ascertain these facts by the verdict of a jury.

Husband and Wife.—Circumstances under which held that a married woman was entitled to sue for damages on account of slander without the concurrence of her husband.

1ST DIVISION.

ARCHIBALD WIGHT, who had been in the service of the appellant Ewing as the manager of a depôt for the sale of coal, brought an action against Ewing for damages in respect of an alleged wrongous dismissal, and for payment of a balance on their mutual accounts, including wages. In defence Ewing denied that he had wrongously dismissed Wight, and made certain statements impeaching the respectability of his character, and charging him with carrying off and not accounting for the value of coals. In making these statements he introduced the name of the respondent, who was living separate from her husband, and in whose house Wight

was with others a lodger. Founding on these statements as malicious and slanderous, and also certain other extrajudicial statements as slanderous, the respondent brought an action before the Court of Session against the appellant, in which she concluded for 2,000*l.* of damages. The appellant pleaded in defence, 1. That the respondent being a married woman had no title to insist in the action, in respect that her husband did not concur with her in it. 2. That the judicial statements were pertinent to the matter at issue, were believed by the appellant and his advisers to be relevant, and were not malicious. And 3. That the extrajudicial statements were either not true, or formed the subject of communications to the appellant's law agents in the action at Wight's instance.

Lord Newton, on the 18th of May 1830, sustained the first of these defences and dismissed the action ; but the Court, on the 19th of November, altered, and appointed the respondent's father to be her curator ad litem.* Thereafter the following issues, which embraced the matter set forth in the respondent's summons, were sent to a jury :—

“ 1. Whether on or about the 12th day of May
 “ 1827 the defender did lodge or cause to be lodged,
 “ in a process then depending in the Jury Court, a paper
 “ or pleading intituled Answers for William Ewing,
 “ Esq. to the condescendence for Archibald Wight, containing the following words, or words to the following
 “ effect, according to the meaning herein-after set furth,
 “ viz.—‘ He ’ (meaning the said Archibald Wight)

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* 9 S. D. B. 31.

- No. 39. “ ‘ was habitually addicted to gambling and drunken-
 24th August “ ‘ ness, and frequently spent days and nights in this
 1833. “ ‘ and other kinds of profligacy, and having gone to
 Ewing “ ‘ reside with a married woman of the name of Cullen,’
 v. “ (meaning the pursuer,) ‘ then living apart from her
 Cullen. “ ‘ husband, he fraudulently supplied her with coals
 “ ‘ from the depôt, for which no payment has ever been
 “ ‘ made by either of them,’ (the defender meaning
 “ ‘ thereby that the pursuer was a party to the alleged
 “ ‘ fraud, by receiving or resetting coals which she knew
 “ ‘ to have been unfairly or fraudulently procured by the
 “ ‘ said Archibald Wight from the defender’s depôt.)
 “ ‘ And whether the whole or any part of the said words
 “ ‘ are of and concerning the pursuer, and are false and
 “ ‘ calumnious, and were maliciously inserted or ma-
 “ ‘ liciously caused to be inserted in the said paper, to
 “ ‘ the loss, injury, and damage of the pursuer?
 “ ‘ 2. Whether on or about the 2d day of June 1827
 “ ‘ the defender did lodge or cause to be lodged in the
 “ ‘ said process a paper or pleading intituled Revised
 “ ‘ answers for William Ewing, Esq. to the revised con-
 “ ‘ descendence for Archibald Wight, containing the
 “ ‘ following words, or words to the following effect, ac-
 “ ‘ cording to the meaning herein-after set furth, viz.—
 “ ‘ ‘ He’ (meaning the said Archibald Wight) ‘ was
 “ ‘ ‘ habitually addicted to gambling and drunkenness,
 “ ‘ ‘ and frequently spent days and nights in this and
 “ ‘ ‘ other kinds of profligacy, and having gone to reside
 “ ‘ ‘ with a married woman of the name of Cullen, then
 “ ‘ ‘ living apart from her husband, he engaged in a
 “ ‘ ‘ fraudulent transaction with this female to disappoint
 “ ‘ ‘ her landlord of his right of hypothec while in the
 “ ‘ ‘ employment of the defender,’ (the defender meaning

“ thereby that the pursuer became a party to a fraudulent transaction for the purpose of disappointing or defrauding her landlord of his right of hypothec over her furniture for payment of his rent.) And whether,” &c.

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“ 3. Whether on or about the 6th of September 1827 the defender did lodge or cause to be lodged in the said process a paper or pleading intituled Re-revised answers for William Ewing, Esq. to the re-revised condescendence for Archibald Wight, containing these words, or words to the following effect, according to the meaning herein-after set furth, viz.— ‘ And of this date (November 9, 1825) sold a quantity of coals to Mrs. Cullen, a married woman’ (meaning the pursuer) ‘ with whom he’ (meaning the said Archibald Wight) ‘cohabited’ (meaning thereby lived in a state of adultery) ‘ during the whole period of his employment in the defender’s service; that he’ (meaning the said Archibald Wight) ‘had engaged in a fraudulent transaction with this person, on or about the 21st of November, to defeat the landlord’s right of hypothec by clandestinely carrying and concealing the furniture of the house,’ (the defender meaning thereby that the pursuer had become a party in a fraudulent transaction to defeat her landlord’s right of hypothec over her furniture by furtively carrying away and concealing the same with the assistance of the said Archibald Wight.) And whether,” &c.

“ 4. Whether on or about the 18th day of November 1828 the defender did lodge or cause to be lodged in the said process a paper or pleading intituled Re-revised answers for William Ewing, Esq.,

- No.39. “ containing the following words, or words to the fol-
 24th August “ lowing effect, according to the meaning herein-after
 1833. “ set forth, viz.—‘ That in like manner, on or about
 EWING “ ‘ the 9th of November 1825, the said Archibald Wight
 v. “ ‘ did deliver over to Mrs. Cullen, residing in Roxburgh
 CULLEN. “ ‘ Place, Edinburgh,’ (meaning the pursuer,) ‘ a quan-
 “ ‘ tity of coals belonging to the defender, in extinction of
 “ ‘ a debt due by the said Archibald Wight to the said
 “ ‘ Mrs. Cullen, or for some other unlawful considera-
 “ ‘ tion.’ (The defender meaning thereby that the
 “ pursuer for some unlawful consideration received or re-
 “ setted coals from the said Archibald Wight, she know-
 “ ing the same not to belong to him, but to the defender,
 “ and to have been unfairly or fraudulently procured
 “ by the said Archibald Wight.) And whether,” &c.
 “ 5. Whether on the North Bridge, Edinburgh, in
 “ the end of November or month of December 1825,
 “ or January 1826, and in presence and hearing of
 “ John Thomson, slater in Edinburgh, the defender
 “ did falsely and calumniously say that the pursuer
 “ kept an improper and disorderly house, (meaning a
 “ bawdy-house,) in which the said Archibald Wight
 “ was living and cohabiting (meaning living in adultery)
 “ with her; that he the said Archibald Wight and
 “ the pursuer were keeping a bawdy-house in Roxburgh
 “ Street; that she fed him on roast ducks and other
 “ good cheer to supper to make him useful to her,
 “ (meaning thereby that he might be able to administer
 “ to her the pursuer’s carnal and licentious appetite;)
 “ that the pursuer was burning his the defender’s coals
 “ in her bawdy-house; that he the defender would
 “ disappoint the pursuer of a few nights of Wight by
 “ having him apprehended and put in jail; or did

“ falsely and calumniously use or utter words to that effect, to the loss, injury, and damage of the pursuer.”

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Two other issues, (6 and 7,) in the same terms, but at different times and places, then followed, and another, 8, “ Whether in the chambers of Messrs. Campbell and Mack, writers to the signet in Edinburgh, on one or other of the days of November or December 1825, or January 1826, in presence and hearing of the said Messrs. Campbell and Mack the defender did falsely and calumniously say” (as in the preceding issue).

No issues in justification were taken.

On the 14th of March 1832, the jury, under the direction of the Lord President, with concurrence of Lord Gillies, returned a verdict, by which “ in respect of the matters proven before them they find for the pursuer upon the first, second, third, fifth, and seventh issues, and assess the damages at 200*l.* sterling, and find for the defender on the other issues.”* Against the direction to the jury a bill of exceptions was tendered in these terms :—“ And the said counsel for the said defender did maintain and insist before the said Lord President and Lord Gillies that in reference to the expressions founded on in the fifth, sixth, and seventh issues, and which are said to have been used in 1825, or January and February 1826, that all action on the part of the pursuer in relation thereto was excluded by the length of time which had been allowed by the pursuer to elapse before complaining of the same or raising her said action, which was not raised till the 8th November 1828. But the said Lord President did at the said trial declare and de-

* 10 S. D. R. 497.

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“ liver his opinion, that the action was not barred nor
 “ the question of damages there affected, and that
 “ though these issues were only established by the tes-
 “ timony of John Thomson, a single witness, yet that
 “ Thomson’s evidence was corroborated by the judicial
 “ statements made by the defender in the above-men-
 “ tioned papers given in by him in the said process
 “ between him and Wight, and now given in evidence
 “ for the pursuer, and that this was fit matter for con-
 “ sideration of the jury; and farther, the said Right
 “ Honorable Lord President gave it as his opinion and
 “ charge to the jury in point of law, that the expression
 “ or words libelled on in the said first four issues were
 “ totally irrelevant between the said defender Mr.
 “ Ewing and the said Archibald Wight in the said
 “ process mentioned, and were not in any way privi-
 “ leged, though used in a judicial discussion; and
 “ with those directions his Lordship left the case to the
 “ said jury; and the jury then and there gave their
 “ verdict on the first, second, third, fifth, sixth, and
 “ seventh issues for the said pursuer, with 200*l.* of
 “ damages; whereupon the said counsel for the said de-
 “ fender did then and there on behalf of the said de-
 “ fender except to the aforesaid several opinions of the
 “ said Lords, and insisted on the said several matters as
 “ an absolute bar to the said action.”

The Court, on the 30th of June 1832, disal-
 lowed the bill of exceptions, sustained the verdict, de-
 cerned against the appellant for 200*l.* sterling, and
 found him liable in expenses.*

Ewing appealed.

* 10 S. D. B. 743.

Appellant.—1. The respondent is a married woman, and the object of the action is to establish a liability against the appellant for payment of a sum of money. On the supposition that such a liability exists, the debt is due not to the respondent, but to her husband, in whom it vested *jure mariti*. It is attachable by his creditors, and not by her creditors; and if he were dead it would not belong to her, but would form part of the goods in communion, and be distributed according to the rules of law. This objection is not obviated by the nomination of a curator ad litem. Such an appointment may be proper and fit where the subject in dispute belongs to the wife herself, as a heritable estate, and the husband declines to concur, or where he has an adverse interest to that of the wife. But the subject in question belongs to the husband *de jure*, and so far from having an adverse interest to the wife, it is his interest that the money should be recovered.

2. The direction that the language used in judicial pleadings was not privileged and was irrelevant to the matter then in dispute was contrary to law, in respect that language used judicially and pertinent, or which the party believes to be pertinent to the matter at issue, is protected, unless evidence be brought that it was used maliciously; and accordingly malice is both libelled and put in issue. From the very nature of the action between the appellant and Wight every statement affecting the respectability of his character and his honesty, and relative to his embezzlement of or intromission with the coals belonging to the appellant, was relevant to exonerate the appellant from the claim of damages made by Wight for his alleged wrongful dismissal, and to show that he had no claim on the state of accounts be-

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No. 39. tween the parties.* Besides, it is to be presumed that
 24th August statements made judicially are relevant, unless the con-
 1833. trary be shown; and in this case the respondent did not
 lay before the Court the condescendence to which the
 EWING answers were made containing the statements com-
 v. plained of, and consequently it was impossible for the
 CULLEN. Court to know that these statements were irrelevant; and
 as malice was not proved the jury ought to have been
 directed to find for the appellant.

3. By the law of Scotland one witness is not sufficient to prove any charge, either of a criminal or civil nature. The only witness adduced in regard to the extrajudicial statements was a person of the name of Thomson. It is true that the testimony of a single witness may be made sufficient by the evidence of corroborative circumstances, but the only circumstance alleged to have existed is that the appellant stated judicially the facts mentioned by Thomson. This is not corroborative of the evidence of Thomson; it is merely a repetition to the Court of the statement, but not that the statement was made to Thomson.

Respondent.—1. It is an established rule that when a husband without good reason refuses to concur in an action at his wife's instance for the vindication of her rights or character, it is competent to authorise the action to be carried on in her own name and of a curator ad litem.† The object of the present action

* Robertson v. Graham, 15th July 1818, 3 Dow, 277; Forteith v. Earl of Fife, 18th November 1819, F. C. 2 Murray's Reports, 470; Gilchrist v. Dempster, 3 Murray, 364.

† Marshall v. Marshall, 9th January 1623, Mor. 6037; Halket v. Gordon, 8th July 1673, Mor. 6,039; Byres, 28th July 1708, Mor. 6045; Finlay v. Hamilton, 5th February 1748, Mor. 6,051; Lady Fowles, 21st December 1626; Mor. 6158; 1 Stair, 4, 15.

was to vindicate the respondent's character, and it was peculiarly fit that she should be authorised to insist in it in her own name and for her own behoof, as her husband, notwithstanding a decree of adherence, remained in a state of separation from her, and the slander was calculated to destroy her reputation in that occupation in which she was engaged to earn her subsistence.

2. The statements of the appellant were irrelevant, in respect that the only matter truly at issue between him and Wight related to certain accounts which existed between them, not in the character of master and servant, but of partners in a joint adventure. Having thus no occasion to introduce the name of the respondent, his assertions in regard to her must be considered as altogether gratuitous, and to have been made from no other motive than malice.

3. The direction to the jury that a single witness corroborated by circumstances was sufficient, was perfectly correct; and the jury being satisfied that there were circumstances corroborative of the testimony of Thomson, their verdict is unimpeachable.

LORD WYNFORD.—My Lords, I beg leave to move your Lordships for judgment in a case in which William Ewing is the appellant, and Mrs. Helen Mackenzie or Cullen the respondent. This was an action for slander, for certain words imputing to the respondent, certainly, that she was living in an improper manner, and keeping very improper company. There would be no doubt that the words were actionable, provided they had not been used on the occasion on which they were; but it appears from the proceeding in this cause, that

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No.39. an action had been brought by the present appellant
24th August against a person of the name of Wight, to recover
1833. wages for services that were due, or supposed to be due,
EWING from the appellant to Wight; and that in answer to
v. this action so brought, the appellant pleaded that slander
CULLEN. which is the subject of the present action. He insisted
that the action could not be maintained for the wages,
for that he was justified in dismissing this person with-
out giving him the warning he otherwise would have
been obliged to give him, "because," as stated in his
answer, "the said Archibald Wight was habitually
"addicted to gambling and drunkenness, and frequently
"spent days and nights in this and other kinds of pro-
"fligacy; and having gone to reside with a married
"woman of the name of Cullen (meaning the pursuer),
"then living apart from her husband, that he fraudu-
"lently supplied this woman," of the name of Cullen,
"with coals from the defender's depôt, for which no
"payment had been made by either." The same con-
versation is stated in different ways: "That the said
"Archibald Wight had sold a quantity of coals to
"Mrs. Cullen, a married woman, with whom he
"cohabited during the whole period of his employment
"in the defender's service." Then it further states the
slander to have been used at different times, and under
different circumstances,—"that he had stated to a per-
"son of the name of John Thomson, slater in Edinburgh,
"and others, that the pursuer kept an improper and
"disorderly house, in which the said Archibald Wight
"was living and cohabiting with her, and did otherwise
"falsely and maliciously asperse the pursuer's charac-
"ter." This being the complaint I have stated to
your Lordships, the answer to it is, that all these

matters, except the last, were pleaded in the cause to which I have referred, — the last undoubtedly was not; the last was an attack on the character of this woman, not made in the course of a judicial proceeding. There was a point made with respect to this in the Court below, which I do not think it necessary your Lordships should decide, namely, whether this was sufficiently proved; it was only proved by one witness; and by the law of Scotland, a fact proved by one witness only, unless that witness is confirmed by other circumstances which have a tendency to give credit to that one witness, is not sufficiently established. I confess I should have great doubt on that point, whether there was sufficient confirmation or not, if it were necessary to decide that point; but I mention it merely for the purpose of showing it has not escaped the notice of your Lordships; at the same time I think it is not necessary for your Lordships to come to any opinion upon it; but there are two points on which it will be necessary for your Lordships to decide; the first is, whether, Mrs. Cullen being a married woman, and her husband not joining in the action, the action is maintainable by her or not? The Judges in the Court below have decided that the action is maintainable by her alone, and I think they have decided rightly; because it is perfectly clear that these damages to her personal character would, in the language of the law, have survived to her in the event of her husband's death, and she might have maintained an action for them after having, according to the practice in Scotland, obtained a curator ad litem. It appears to me that the Judges in the Court below decided perfectly right;—that there was no limit to this action, though brought in her own

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No.39. name, and not in the name of her husband. Your
24th August Lordships are not in the habit of giving more effect
183. to points of mere form than the law, in its utmost
EWING strictness, requires you to do. Several cases were
v. mentioned at your Lordships bar, in which this point
CULLEN. appears to me to have been decided precisely as the
Judges in the Court of Session have decided; there-
fore, if these were the only grounds of objection, I
certainly should advise your Lordships to affirm the
judgment. But it is my misfortune to differ from the
learned Judges in the Court of Scotland on another,
and a most material point, and on that I shall feel it
my duty to advise your Lordships to reverse the judg-
ment. The principle of the law of Scotland, and that
of the law of England, appears to me to be precisely the
same with respect to any thing stated in the course of
judicature, and though it is false, though it is slander,
yet if the party who offers it in evidence believes it to be
true, and therefore does not offer it in evidence from
motives of malice, it cannot be made the subject of an
action. That doctrine of law, I am sure, your Lord-
ships will perceive is founded on good sense. In ordi-
nary cases, if I speak ill of another man, it is presumed
I do that from malice, unless I show the contrary; but
if I speak ill of a man in a course of judicature, it is
not to be presumed I do it from malice, if it be per-
tinent to the cause, and if I tender it in evidence in my
own defence; and therefore in those cases the law of
England and the law of Scotland—for there are many
authorities in the law of both countries—all concur in
providing that in these cases you must prove the false-
hood of the words, and that when they were spoken the
person speaking knew the falsehoods; and so bringing

home to the party using the words, that he did not make use of them merely for the purpose of defending himself against the action brought against him, but that he made use of these words from a malicious desire to asperse the character of the person of whom they were spoken. There should, in my opinion, have been an inquiry in the Court below into that subject, and your Lordships will find, that there are several cases in which that inquiry has been made; but the two learned Judges who presided upon that occasion unfortunately prevented all inquiry upon that subject, by directing that a verdict should be found for the pursuer; because, they said, the words were not relevant to the issue in the cause in which they were uttered. The only question, therefore, for your Lordships is, whether these words were relevant to the cause in the defence of which they were made use of. Now, I confess it appears to me, it is scarcely possible for any man to hesitate to say they were relevant. What was the nature of the action against Ewing, the present appellant? It was an action for turning a man off without giving him sufficient notice, and paying him his wages. By the law of England and the law of Scotland, if a man conducts himself improperly in your service, he does that which gives you a right to dismiss him, without giving him any warning, or paying him any wages. What was the defence set up here, which it was said was not pertinent? That this man, who owed regular and faithful service to his employer, was absent from that service, was in a continual state of intoxication, and was living, and most improperly living, with a married woman. If it stopped here, surely this would be sufficient. What respectable person would consider a man deserving who so conducted himself, if

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No. 39. it led to no bad consequences, if it did not affect his particular interest? Is there any respectable man who would keep a servant in his family who night by night left that family to commit the foul crime of adultery, and was in the day-time in a state of intoxication? I conceive every one of your Lordships would think that any decent and respectable man was justified in dismissing such a man, and that consequently its pertinency and relevancy to the question then to be decided is apparent. But this gentleman was a coal merchant,—he was selling coals; and the words impute that this man carried away to an improper house his employer's coal, which he was bound to take care of, no account whatever being kept of the quantity of those coals so taken; in fact, that his employer was night by night cheated out of his coals by this improper conduct; and really I cannot conceive how any one could for a moment suppose facts such as these were not relevant in the cause, and that, if true, he was not justified in using the words; but the Judges have (in my opinion unfortunately) directed the jury that all this matter was totally irrelevant to the point to be decided in the cause, and that therefore the jury were to consider the words spoken as without any justification or pretence of justification, and to give damages for the uttering them; and the jury under this direction thought proper to give damages to the amount of 200*l*. If these words had been spoken of a decent respectable woman, it does not appear to me that the damages were too much; but as that question has not been inquired into, is it proper that such a verdict as this should stand with damages to the amount of 200*l*., given under the circumstances under which this verdict was given? I mentioned to

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your Lordships that there was a difficulty as to whether the words were proved sufficiently, but that question I do not think it necessary for your Lordships to inquire into; and I will state why, because the jury have given damages upon the whole; for the jury have been directed to find damages for that which was spoken in a court of justice litigating, as well as that which was spoken not in a court of justice; so that your Lordships cannot know to what extent they estimated the damages for that spoken out of a court of justice and that spoken in a court of justice. If they had confined it to the words spoken out of a court of justice, your Lordships must then have decided whether that was sufficiently proved. Unfortunately the whole damages are put together. I cannot bring my mind to doubt that that stated on the pleadings was relevant to the cause, and that it could not, consistently with the law in England or Scotland, be permitted to be given in evidence against the appellant. It is necessary, therefore, if the view I have taken of that point be right, that the case should go back again, in order that, if the party is entitled to damages on the other part of the case, the Court may decide whether there is confirmatory evidence of that stated by one witness, and whether a jury will give the same damages for a loose declaration made by a man who admitted that he had stated that if he was not paid a debt due to him from the defender, he would not open his mouth in his favour. Probably, if the thing had been put straight to the jury, no credit would have been given to him unless he was considerably confirmed; but as lumping damages have been given for the whole, if your Lordships think that for a part no damages at

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No.39. all ought to have been given, then the verdict cannot
 — stand. The learned Judges (certainly eminently learned
 24th August 1833. in matters of Scotch law) are not at present very well
 — acquainted with jury law. Your Lordships very well
 EWING know that trial by jury has been introduced but a few
 v. years to any considerable extent in the courts of Scot-
 CULLEN. land; it is not therefore wonderful that those learned
 Judges, most eminently learned upon those parts of law
 to which their minds have in early life been applied,
 should not come with that confidence to a decision of a
 matter of this description which the Judges would have
 done who had received a different education, and pur-
 sued a different practice from that which those learned
 Judges have done.

My Lords, I think the simple question upon
 which the whole depends is, whether these defences
 were relevant to the question to be decided in the
 cause of *Wight v. Ewing*? If they were, the judg-
 ment pronounced by the two learned Judges in the
 Court below is wrong. Upon this point there is a
 case which was determined some years ago, in which a
 similar error appears to have been fallen into; it came
 by appeal to this House, and Lord Eldon corrected
 that judgment by sending it back, as I am of opinion
 your Lordships must do in this case. In the case of
Robertson v. Graham, the Court of Session ordered
 certain passages in a pleading of General Robertson
 reflecting on the conduct of a third person, not a party
 in the cause, to be expunged, and found the third party,
 who petitioned the Court to that effect, entitled to the
 expenses of the application. That was the only discus-
 sion, whether they ought to have been expunged from

the pleadings; and that, I think, ought to have been the only question made here. There was an appeal to the House of Lords, and the case was remitted to the Court of Session to review their judgment, Lord Eldon saying, "It is sufficient to justify the judicial use of the language, that General Robertson and his counsel did really believe what was stated." Now, my Lords, that decision is directly applicable to the present case, if the learned Judges had put it to the jury to inquire whether there was ground for believing that the appellant believed the fact to be as stated. This, my Lords, is the whole of the case. I am extremely sorry, on all occasions, when I have occasion to differ in opinion with the learned Judges in the Court below, and I never do it lightly. This case was discussed a fortnight ago; it is always a painful duty for one single Judge to object to the judgment of several Judges; and I have during the last fortnight considered it again and again, and as often as I have considered it the opinion I at first formed is strengthened. I cannot persuade myself, that if this course of proceeding is to be permitted parties will not be placed in a situation which will render it impossible that any cause can be properly tried. The parties in courts of justice must be free, or they cannot ascertain their rights in the manner in which they ought to do, and by which they are likely to obtain justice. It is not fit that any objection should be unnecessarily taken to that which passes in a court of justice. It is not necessary that the effect of words that pass in courts of justice should be watched with the same anxiety which applies to that which passes in other places. A much greater evil would be effected than

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No. 39. can happen to the character of any individual whatever,
24th August if parties were prevented pleading that which they feel
1893. they ought to plead in a court of justice; at the same
time, what I state does not preclude an inquiry,
EWING whether this was done premeditatedly with a view to
v. injure the character of this individual, without the
CULLEN. defender and his legal adviser having reason to believe
it to be true. Under these circumstances, my humble
motion to your Lordships is, that these interlocutors be
reversed.

The House of Lords declared, That the words libelled on
in the first four issues were relevant to the matter in issue
in the process therein mentioned between the said appel-
lant and the said Archibald Wight, and were privileged as
used in a judicial discussion, unless it could be shown that
the party so using them did in fact use them from motives
of malice towards Mrs. Helen M'Kenzie or Cullen, and did
not himself believe them to be true: And this House does
therefore find, that The direction given by the Lord Presi-
dent to the Jury in this case was not correct in point of
law, and that the bill of exceptions taken thereto ought to
have been allowed. But this House is further of opinion,
that an opportunity ought to be afforded for ascertaining by
the verdict of a jury, whether the said appellant did use
the said expressions and words out of malice towards the
said respondent, and did not himself believe them to be
true; and also whether the expressions and words libelled
on in this action, or any, and which of them in particular,
are sufficiently proved according to the law of Scotland:
And it is therefore ordered and adjudged, That the said in-
terlocutors, so far as complained of, be and the same are
hereby reversed: And it is further ordered, That the said
cause be remitted back to the said First Division of the
Court of Session in Scotland, and that the Judges of that
Division do allow the said bill of exceptions, and do give

the necessary and proper directions for submitting the case again to the consideration of a jury, upon such issues as shall be settled according to the course of the Court, having regard to this judgment and order; and further, to proceed in the said cause in such manner, and do make all such orders respecting expenses of process in the Court of Session and Jury Court, as shall be just and consistent with this judgment.

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J. BUTT—A. & R. MUNDELL, Solicitors.

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No. 40. The Honourable RAMSAY MAULE of Panmure, Appellant.—*Lord Advocate (Jeffrey)*—*Murray*.

WILLIAM MAULE, Esq., Respondent.—*Dr. Lushington*
—*Robertson*.

Res Judicata—Entail.—Circumstances in which (reversing the judgment of the Court of Session) a decree pronounced in 1782, in a question with an heir of entail, was held *res judicata* as to part of the subject matter thereof, in a question with a subsequent heir of entail.

1st Division.
Lord Newton.

JAMES MAULE, fourth Earl of Panmure, having engaged in the rebellion 1715, was attainted, and his honours and estates of Panmure, Brechin, and Ballumbie were forfeited to the crown. His Countess, Lady Margaret Hamilton, was allowed to retain her life-rent of the family seat of Brechin, and also an annuity over the estate of Panmure, which had been secured to her by her contract of marriage.

James, the attainted Earl, died without issue, and was succeeded by his immediate younger brother, Mr. Harry Maule, proprietor of the estate of Kelly, who entered a claim to the estate of Ballumbie (which alone had been entailed), and it was sustained. In the year 1719, the estates of Panmure and Brechin were purchased by the York Buildings Company.

On the 23d of April 1724 the York Buildings Company granted a tack, in favour of Harry Maule and his

assignees, of the mansion house of Brechin and other subjects, at the rent of 50*L*., for ninety-nine years from the first term after the expiry of the life-rent of the Countess of Panmure.

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On the same day, they granted a lease to the Countess and her assignees of the mansion house of Panmure, and other subjects, at the rent of 100*L*., also for ninety-nine years from the term of entry, which was declared to begin on the 15th of May 1724.

On the 5th of June of the same year the Countess granted an assignation of the lease of the mansion house of Panmure (reserving her own life-rent) to Harry Maule and the heirs male of his body; which failing, his other heirs and assignees whatsoever, the eldest heir female succeeding without division.

Harry Maule had four sons, George, James, William, and John. George and James predeceased their father without issue. William was afterwards created an Irish peer, by the title of Earl of Panmure. John was an advocate at the Scotch bar, and afterwards one of the barons of exchequer. Harry Maule had also two daughters, Henrietta and Jean; the former of whom died unmarried, and the latter married Lord Ramsay, son of the third Earl of Dalhousie, who was the grandfather of the appellant, the Hon. Ramsay Maule.

In the year 1730 Harry Maule, his two sons William and John, and the Countess, executed five separate entails of the property respectively belonging to them, in favour of the same series of heirs; viz., 1st, An entail of the estate of Kelly by Harry Maule, with consent of his two sons; 2d, An entail of a bond to the extent of 9,000*L* granted by his son William

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- Maule; 3d, An entail of the estate of Ballumbie, executed by the sons, William and John; 4th, An entail of the lease of Brechin, executed by Harry Maule; and 5th, An entail of the lease of Panmure, executed by the Countess and Harry Maule. Under these entails the respondent alleged that his father and he were substitutes.

The Countess of Panmure died on the 6th of December 1731, and Harry Maule on the 23d of June 1734, upon which last event William Maule, afterwards Earl of Panmure, took possession of the taillied estates.

On the 12th of October 1745 he executed a general disposition of all his lands and estates, including the leases of Brechin and Panmure, in favour of himself and the heirs male lawfully to be procreated of his body; whom failing, to John Maule (Baron Maule), and the heirs male lawfully to be procreated of his body; whom failing, to his own nearest heirs and assignees whatsoever, the eldest heir female always succeeding without division.

On the 10th of May 1758 he executed another disposition in favour of himself and the heirs male of his body; whom failing, to his brother John, and the heirs male of his body; whom failing, to his own nearest lawful heirs and assignees whatsoever, of all his heritable estates, with power of revocation.

In the year 1765 a large portion of the forfeited estate, comprehending the mansion house and demesne of Brechin, was exposed to sale, and was purchased by the Earl. On completing the purchase his Lordship expedé a crown charter, in which he included the estates of Kelly and Ballumbie; and, failing himself and the

heirs male of his body, he substituted his brother Baron Maule, and the heirs male of his body, without any limitation whatever. On the 30th of August 1775, he executed a strict entail of his whole estates, calling his brother, and the heirs male of his body; whom failing, George Earl of Dalhousie in life-rent, and the appellant, his second son, in fee. On the 12th of July 1779, he executed a disposition and settlement in favour of himself and the heirs male of his body; whom failing, his brother Baron Maule, and the heirs male of his body; whom failing, his own nearest heirs and assignees whomsoever, of the mansion house, gardens, and parks of Panmure, and other subjects contained in the lease granted to the Countess by the York Buildings Company. On the 18th of September of the same year, he executed another disposition and settlement of these subjects, in favour of the heirs mentioned in the deed of entail of August 1755.

In the year 1781 Baron Maule died unmarried, and in his repositories there were found two separate parcels containing the deeds of entail executed in 1730, and which had been deposited with him; and also a deed, bequeathing the parcels to the respondent's father, as the heir called by these deeds. On this being made known, the Earl of Panmure executed in duplicate, on the 18th of August and 8th of September 1781, a deed of declaration, translation, and revocation, ratifying the settlements which he had made in 1775 and 1779, and revoking the deeds which had been found in Baron Maule's repositories; and on the 6th of October of the same year, he executed a disposition in favour of the Earl of Dalhousie, and the heirs therein mentioned, of all his property, both heritable and moveable, under certain

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No. 40. exceptions; and on the same day he executed a settlement of the property so excepted. On the 12th he made an entail of all his estates, in favour of himself and the heirs male of his body; whom failing, the Earl of Dalhousie in life-rent, and the appellant in fee.

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The Earl died on the 4th of January 1782, at the age of 82, without issue; whereupon a competition of brieves ensued between the respondent's father, the late Thomas Maule, Esq., and the present appellant, each claiming right to the estates and leases comprehended under the various entails. Previous to this an action of reduction and declarator had been raised by the late Earl, and on his death was insisted in by Lord Dalhousie, on his own behalf as life-renter, and as administrator in law for his son the appellant, as fiar, against the respondent's father, for setting aside the deeds of entail of 1730. The latter, on the other hand, raised a counter action of reduction improbation, for having all deeds done in contravention of these entails of 1730 reduced. The respondent was called as a party in these proceedings,—an execution against him personally having been returned, and also against his tutors and curators, if he any had, edictally, at the market-cross of Dumfries. The Court of Session, on the 5th of March 1782, pronounced the following judgment:—" On report of Lord " Gardenston, senior Lord Assessor, who, along with " Lord Kennet, attended the Macers in the above-mentioned competition of brieves, and having advised the " mutual informations given in by both parties, with the " several processes which are now conjoined, writs produced and proof adduced, and having heard parties " procurators in their own presence, the Lords find,

“ that the deed of taillie executed by the deceast
 “ Mr. Harrie Maule of Kelly, with consent therein
 “ mentioned, in the year 1730, of his lands and estate
 “ of Kelly, and also the deed of taillie executed by the
 “ late William Earl Panmure, in the aforesaid year, of
 “ his lands and estate of Ballumbie, are cut off both by
 “ the positive and negative prescription; and that the
 “ obligation for employing 9,000*l.* sterling, executed by
 “ the said William Earl of Panmure in the aforesaid
 “ year, is cut off by the negative prescription; and
 “ therefore sustain the reasons of reduction of these
 “ three deeds, and reduce, decern, and declare accord-
 “ ingly: Find that the said William Earl of Panmure
 “ had full power to make the deed of taillie executed
 “ by him in favour of the said Mr. William Ramsay
 “ Maule and his administrator at law; repel the reasons
 “ of reduction of that deed of taillie, and assoilzie the
 “ said Mr. William Ramsay Maule and his administra-
 “ tor at law from the process of reduction improbation
 “ and declarator, at the instance of the said Lieutenant
 “ Thomas Maule against them, in so far as the same
 “ relates to the estates of Kelly and Ballumbie, and
 “ also from the process against them for implement and
 “ performance of the prestations contained in the ob-
 “ ligation for the 9,000*l.*: Find that the said Mr. Wil-
 “ liam Ramsay Maule is entitled to be served heir of
 “ taillie and provision to the said deceast William Earl
 “ Panmure, his grand uncle, in virtue of the foresaid
 “ deed of taillie in his favour; and remit to the Macers
 “ to proceed in his service accordingly in the brieve
 “ brought before them by him and his administrator in
 “ law: Find that the said Lieutenant Thomas Maule

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“ has right to take up the leases of the house and parks
 “ of Panmure, and house and parks of Brechin, and
 “ decern against the said Mr. William Ramsay Maule,
 “ and his said administrator in law, in the conclusions
 “ of declarator and removing in the foresaid action at
 “ the instance of Lieutenant Thomas Maule, so far as
 “ the same respects these leases, and remit to the Macers
 “ to proceed in his service in so far as regards these two
 “ leases; but find that he is not entitled to be served
 “ heir male of taillie and provision to the said William
 “ Earl Panmure, in virtue of the deed of taillie of the
 “ estate of Kelly executed by the said Mr. Harrie
 “ Maule, nor in virtue of the deed of taillie of the estate
 “ of Ballumbie executed by the said William Earl of
 “ Panmure, and that his service on the brieve taken out
 “ by him cannot proceed with regard to the said estates
 “ of Kelly and Ballumbie; and remit to the Macers to
 “ dismiss the same accordingly, in so far as concerns
 “ these two estates, and decern.” An appeal was im-
 mediately entered by Lord Dalhousie and the appellant
 against this judgment, so far as it was unfavourable to
 them; but it was afterwards withdrawn. No appeal,
 so far as it related to the estates of Kelly and Ballumbie
 and the bond, was entered by the respondent's father.

Thereupon a deed in the form of a submission, com-
 prehending all the proceedings under the actions, was,
 on the 30th March 1782, entered into betwixt Lord
 Dalhousie, for himself, and as administrator in law for
 the appellant, on the one part, and Thomas Maule, for
 himself, and as administrator in law for his son the
 respondent, on the other part.

Two days after the date of the submission, (2d of

April 1782,) a decree arbitral was issued by the arbiters, by which they affirmed the judgment of the Court of Session, in so far as respected the estates of Kelly and Ballumbie and bond for 9,000*l.*, but reversed the same in so far as regarded the leases of Panmure and Brechin, and found the respondent's father entitled to the sum of 3,500*l.*, to be paid in a particular way, and under the condition that if he or his son should attempt to make any claim on pretence of not being bound by the submission, or any other ground, it should then be competent for Lord Dalhousie, or any other heir to the estate of Panmure, to insist for repetition of the money. The money was paid in terms of the decree.

The respondent's father died in the month of November 1789; and in the year 1809, the respondent, alleging that he had been in the meanwhile ignorant of the nature of his rights, raised an action against the appellant, before the Court of Session, concluding for reduction of the submission and decret arbitral, and claiming the benefit of the judgment of 1782, in favour of his father, in respect to the leases of Brechin and Panmure.

On the 9th of March 1813 the Second Division of the Court pronounced an interlocutor in these terms:—

“ The Lords, having resumed consideration of this
 “ process, and advised the mutual informations and
 “ additional informations for the parties, writs produced,
 “ and former proceedings, repel the reasons of reduc-
 “ tion, sustain the defences, assoilzie and decern: Find
 “ the defender entitled to expenses, allow an account
 “ thereof to be given in, and remit to the auditor to
 “ examine the same, and report; superseding extract
 “ till the first box day in the ensuing vacation; and, if

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No. 40. “ a petition shall then be given in, supersede extract
 27th August “ farther till the petition shall be disposed of.”
 1833. Against this interlocutor the respondent appealed; and
 MAULE upon the 10th of May 1816, the House of Lords pro-
 v. nounced this judgment:—“ The Lords spiritual and
 MAULE. “ temporal, in Parliament assembled, Find that in
 “ this action and proceeding between the present appel-
 “ lant and respondent, the alleged submission and
 “ alleged decree arbitral, of the respective dates of the
 “ 30th of March 1782 and 2d of April 1782, ought not
 “ to be considered as being or having in law the effect
 “ of a submission or decree arbitral, but as a form
 “ adopted in which an agreement previously made
 “ between Thomas Maule, the appellant’s father, and
 “ George Earl of Dalhousie, parties to the said submis-
 “ sion, was concluded; and, with this finding, it is
 “ ordered that the said cause be remitted back to the
 “ Court of Session in Scotland, to review the interlocu-
 “ tor complained of in the said appeal, and upon such
 “ review to do therein as is just and consistent with this
 “ finding.”

On the case returning to the Court of Session, their Lordships, on the 2d of December 1817, pronounced this interlocutor:—“ The Lords, having resumed con- sideration of the mutual informations for the parties, with the additional informations, and whole circumstances of the case, sustain the defences pleaded for the defender, assoilzie him, and decern.”

Upon a second appeal by the respondent, the House of Lords, on the 10th of July 1819, pronounced a judgment in these terms:—“ It is ordered and adjudged by the Lords spiritual and temporal, in Parliament assembled, That the said interlocutor

<p>“ therein complained of be and the same is hereby “ reversed, so far as it is inconsistent with the order of “ this House of the 10th of May 1816, remitting the “ cause back to the Court of Session in Scotland to “ review the interlocutor of 9th March 1813 complained “ of in the former appeal, and so far as it sustains “ generally the defences pleaded for the defender, and “ except as herein-after expressed : And it is farther “ ordered and adjudged, that the instrument of 2d “ April 1782, purporting to be a decreet arbitral, ought “ to be set aside and reduced as a decreet arbitral “ affecting any rights of the appellant: And it is de- “ clared, that, under the circumstances of this case, the “ interlocutor of 1st March 1782 is not to be considered “ as final and conclusive against the respondent with “ respect to the leases in question; and therefore, as to “ so much of the appellant’s action of reduction and “ declarator as seeks a declaration of the rights of the “ appellant to such leases, it is further ordered and “ adjudged, that the said interlocutor of 2d December “ 1817 be and the same is hereby affirmed, but without “ prejudice as to any question between the parties in “ any other action touching any property comprised in “ the deeds of taillie in the pleadings mentioned.”</p>	<p>No. 40. <hr/> <i>27th August</i> 1833. <hr/> MAULE v. MAULE.</p>
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This judgment was applied by the interlocutors of Lord Cringletie, Ordinary, the one dated the 26th of November 1819, in these terms:—“ The Lord Ordinary, having considered the petition and remit from the Court, assoilzies the defender from the conclusions of the libel of declarator, and decerns.” And the other dated the 7th of March 1820, in these terms:—“ The Lord Ordinary, having advised this petition for the Honourable William Maule, with the interlocu-

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“ tor of the House of Lords, therein recited, the
 “ interlocutor of the Lords of the Second Division
 “ applying the same and remitting the cause to the
 “ Lord Ordinary, and mutual minutes for the parties,
 “ observes, that in the said interlocutor of the House of
 “ Lords there is a clerical mistake in terming the action
 “ a declarator, which it is not, the same being a reduc-
 “ tion of the decret arbitral therein mentioned, also a
 “ removing of the said Honourable William Maule from
 “ certain subjects therein described, and of count and
 “ reckoning for the rents thereof; and therefore the
 “ Lord Ordinary, in application of the said judgment
 “ of the House of Lords, and remit by the Lords of the
 “ Second Division to him, reduces the said decret
 “ arbitral, and decerns and declares accordingly; but
 “ assoilzies the said honourable defender from the conclu-
 “ sions of removing and of count and reckoning contained
 “ in the said summons, and decerns, ‘ without prejudice
 “ ‘ as to any question between the parties in any other
 “ ‘ action touching any property comprised in the deeds
 “ ‘ of taillie in the pleadings mentioned,’ viz. in this
 “ action; and, of consent of parties, alters the interlocu-
 “ tor of date the 26th November last to the above
 “ extent.”*

In the year 1821 the respondent raised a new action against the appellant, in which he claimed right, under the entails of 1730, both to the estate of Kelly and Ballumbie, and to the sum of 9,000*l.*, and also to the leases of Brechin and Panmure as heir of entail. In defence

* In the meantime the appellant raised an action against the respondent for repayment of 2,500*l.*, being the sum that remained due out of the 3,500*l.* ordered to be paid by the award; and decree was, upon the 22d of November and 7th December 1822, pronounced.

the appellant pleaded *res judicata*; and Lord Alloway, on the 5th of June 1823, pronounced this interlocutor :—
 “ The Lord Ordinary, having considered the memorials
 “ for the parties, and whole process, Finds that by the
 “ extracted decree of the Court of Session of 5th March
 “ 1782, by the judgment of the Court of Session, 9th
 “ March 1813, by the judgment of the House of Lords,
 “ 10th May 1816, by the judgments of the Court of
 “ Session, 21st May 1816 and the 4th of March and
 “ 2d December 1817, by the judgment of the House of
 “ Lords, 10th July 1819, and by the extracted decreet
 “ of the Court of Session, 7th March 1820, all rights
 “ and interest which the pursuer claims under the pre-
 “ sent summons of reduction and declarator are totally
 “ excluded, and the subject matter of this action is *res*
 “ *judicata* by the judgments above referred to; there-
 “ fore assails the defender from this action, and
 “ decerns.” To this judgment the First Division of the
 Court adhered on the 1st June 1824.

The appellant having appealed, the House of Lords, (26th May 1826,) pronounced this judgment :—“ After
 “ hearing counsel on Friday the 5th day of this instant
 “ May, upon the petition and appeal of William Maule,
 “ Esq., residing in Edinburgh, son and heir of the late
 “ Lieutenant Thomas Maule, complaining of three in-
 “ terlocutors of the Lord Ordinary in Scotland, of the
 “ 5th and 26th of June and 12th November 1823, and
 “ also of an interlocutor of the Lords of Session there,
 “ of the First Division, of the 1st of June 1824, and
 “ praying that the same might be reversed, varied, or
 “ altered, so far as complained of; or that the appellant
 “ might have such relief in the premises as to this
 “ House, in their Lordships great wisdom, should seem

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No. 40. “ meet; as also upon the joint and several answers for
 27th August “ the Honourable William Ramsay Maule of Panmure,
 1893. “ and the Right Honourable the Earl of Dalhousie,
 MAULE “ put in to the said appeal, and due consideration had
 v. “ this day of what was offered on either side in this
 MAULE. “ cause;—It is ordered and adjudged by the Lords
 “ spiritual and temporal, in Parliament assembled,
 “ That the interlocutors complained of in the said
 “ appeal be and the same are hereby affirmed, with
 “ respect to the estates of Kellie and Ballumbie, and
 “ the bond for 9,000*l.* in the said interlocutors men-
 “ tioned, so far as the said interlocutors find that all
 “ right and interest in the said estates and bond, which
 “ the appellant claimed under the summons of reduc-
 “ tion and declarator in the said interlocutors men-
 “ tioned, were totally excluded, and the subject matter
 “ of the action then before the Court as to such estates
 “ and bond was *res judicata* by the judgment contained
 “ in the decreet of the Court of Session of the 5th of
 “ March 1782 in the said interlocutors mentioned, in-
 “ asmuch as it appears to their Lordships that it was
 “ not competent to the appellant, by the summons of
 “ reduction and declarator in the said interlocutors
 “ mentioned, to impeach such decreet of the 5th of
 “ March 1782, so far as the same respected such estates
 “ and bond, and such decreet has not been impeached
 “ by reclaiming petition or appeal, or any other pro-
 “ ceeding competent to impeach the same: And it is
 “ further ordered and adjudged, That the interlocutors
 “ complained of be and the same are hereby reversed,
 “ so far as the same find that all right and interest
 “ which the appellant claims in the leases of Brechin
 “ and Panmure under the summons of reduction and

“ declarator in the said interlocutors mentioned were
 “ totally excluded, and that the subject matter of the
 “ action then in question touching such leases was res
 “ judicata by all the several judgments referred to in
 “ the interlocutors complained of; inasmuch as the said
 “ decret of the Court of Session of the 5th of March
 “ 1782, instead of excluding, expressly affirmed the
 “ title under which the appellant claimed such leases,
 “ and the judgment of this House of the 10th of July
 “ 1819, in the said interlocutors mentioned, expressly
 “ left all questions open to both parties with respect to
 “ the said leases, notwithstanding such judgment or any
 “ of the proceedings in the Court of Session to which
 “ such judgment referred, such judgment of this House
 “ having declared that, under the circumstances of the
 “ case, the said decret of the 5th of March 1782 was
 “ not to be considered as final and conclusive against
 “ the respondent with respect to such leases; and having
 “ therefore, as to so much of the appellant’s action of
 “ declarator and reduction then before the House as
 “ sought a declaration of the rights of the appellant to
 “ such leases, founded on the said decret of the 5th of
 “ March 1782, affirmed the interlocutor of the 2d of
 “ December 1817 then complained of, but having also
 “ expressly declared, that the affirmance of such inter-
 “ locutor by this House was without prejudice to any
 “ question between the parties in any other action
 “ touching any property comprised in the deeds of tailie
 “ therein mentioned; the intent and meaning of the
 “ whole of such judgment being to leave all questions
 “ respecting the right to the said leases, as well as to
 “ the rest of the property comprised in the deeds of tailie
 “ therein mentioned, open to be discussed in such

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No. 40. “ manner as the same might be properly discussed in
27th August “ any future proceeding properly instituted for that
 1833. “ purpose: But as it appears that the Court of Session,
 MAULE “ in pronouncing the interlocutors complained of, have
 v. “ not entered into any question touching the right to
 MAULE. “ the said leases, except the question, whether, by the
 “ several judgments in the said interlocutors mentioned,
 “ all right and interest which the appellant claimed
 “ under the summons of reduction and declarator then
 “ before the Court were totally excluded, and whether,
 “ therefore, the subject matter of that action respecting
 “ such leases was *res judicata* by the judgments referred
 “ to in such interlocutors, so that the right of the
 “ appellant to the benefit of such leases has not been
 “ properly discussed in the action of reduction and de-
 “ clarator then before the said Court, according to the
 “ reservation contained in the judgment of this House
 “ of the 10th July 1819, and the true intent and mean-
 “ ing of that judgment,—it is further ordered, That
 “ this cause be referred back to the Court of Session,
 “ so far as the same respects the right and title to the
 “ said leases; and that the said Court do proceed therein
 “ in such manner as shall be consistent with this judg-
 “ ment and with the former judgments of this House,
 “ and as shall be just.”*

* Before this judgment was pronounced, the respondent had entered a petition of appeal against the interlocutor of 1782, on which this deliverance was issued on report from the Appeal Committee:—“ The Earl of Shaftesbury reported from the Lords Committee appointed to consider of the causes in which prints of the appellants and respondents cases, now depending in this House, in matters of appeals and writs of error, have not been delivered pursuant to the standing orders of this House, and to report to the House; and to whom was referred a petition of William Maule, Esq., praying their Lordships to receive his petition of appeal against an interlocutor of the 1st March 1782, pro-

In the month of August thereafter the respondent instituted an action of reduction improbation and declarator against the appellant and the other heirs of entail, setting forth the proceedings, and particularly the last judgment of the House of Lords; and that “a proper “and suitable mode of impeaching the said judgment “of our said Lords of 5th March 1782, so far as “regards the lands and baronies, and sum of 9,000*l*. “aforesaid, and of obtaining redress against the antecedent and posterior acts and deeds of the defenders and their authors, being by the process of reduction, declarator, and other conclusions after written.” Therefore he called for exhibition and reduction of the decree pronounced upon the 5th day of March 1782, with the grounds and warrants on which the said decree proceeded; and also the whole of the respondent’s titles from 1734 to the lands of Kelly and Ballumbie, and the bond for 9,000*l*. His main reason for reduction of the decree of 1782 was, that during the whole period of the proceedings he was in

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“nounced by the Court of Session, in a competition between Thomas “Maule on the one part, and the late Earl of Dalhousie and the “Honourable William Ramsay Maule on the other part; that the Committee had met and considered the petition of William Maule, Esq., “praying their Lordships to receive, under the circumstances stated in “the said petition, his petition of appeal against an interlocutor of the “Court of Session, dated the 1st March 1782, pronounced in a competition between Thomas Maule, the petitioner’s father, on the one part, “and the late George Earl of Dalhousie and the Honourable William “Ramsay Maule, on the other part, and thereby permit the petitioner to “obtain a discussion of his claims, which were locked up by a compromise “to which he was made a party when a minor, and which he has now “reduced; and the said petitioner being in attendance, did not insist upon “the prayer of his said petition, but prayed their Lordships leave to withdraw the same; and the Committee are of opinion, that the said petitioner should be allowed to withdraw his said petition as desired; which “report, being read by the clerk, was agreed to by the House, and ordered “accordingly.”

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pupilarity, and had no tutors or curators, and no tutor ad litem; and, in so far as he was concerned, the decree passed in absence of him, and while he was non valens agere cum effectu, and was to his lesion, and the right of appeal had been foreclosed by the collusive agreement made by means of the submission and decret arbitral; and as that decree had been set aside it was now competent for him to impeach the decree of 1782 in any way by law competent, and a process of reduction improbation was competent for that purpose.

In defence the appellant produced the extracted decree of 1782 as sufficient to establish a plea in defence of res judicata, and to exclude the respondent's title to reduce the other deeds called for; and he maintained that, until the defence of res judicata was overruled, he was not bound to make any further production.

Lord Newton pronounced this interlocutor on the 23d December 1826 :—" Having considered the summons and defences, and heard parties procurators, Finds that, in order to satisfy the production, it is not sufficient for the defender to produce the decree of the Court of Session of 1st March 1782, as excluding, while unreduced, the pursuer's title to call for the other writs under reduction; therefore repels the preliminary defence to the production of the said writs, and decerns.

" *Note.*—The Lord Ordinary is quite aware that the pursuer must succeed in reducing the decree before he can be heard to challenge the other deeds called for; but the necessity of following this order does not appear to justify the defender's refusal to satisfy the production by producing the whole. In actions of this nature, where a series of titles are challenged,

“ the validity of the later ones generally depends upon
 “ that of the earlier; but the defender is not, on this
 “ account, allowed to content himself at first with pro-
 “ ducing a part. The case of Irvine of Drum against
 “ the Earl of Aberdeen, as decided in the House of
 “ Lords 2d April 1770, founded on by the pursuer,
 “ seems very much in point. Besides, the form of
 “ proceeding contended for by the defender seems in-
 “ consistent with that required by the Act of 6 Geo. 4.
 “ cap. 120., as it would be necessary to receive peremp-
 “ tory defences, and to make up and close the record,
 “ in order to dispose of the decree 1782, while, in the
 “ event of this being reduced, a further set of defences
 “ would need to be given in, and a second record to
 “ be made up in reference to the other deeds. Now,
 “ although, from the peculiar nature of actions of re-
 “ duction, dilatory defences may be lodged and con-
 “ sidered separately, there is no reason why the whole
 “ peremptory defences should not be stated at once,
 “ in terms of the 2d section of the act.”

The respondent having reclaimed, the First Division of the Court, on the 31st January 1827, pronounced this interlocutor:—“ The Lords having resumed the
 “ consideration of this note, and heard the counsel for
 “ the parties thereon, they alter the interlocutor of the
 “ Lord Ordinary complained of, and remit to his Lord-
 “ ship to hear parties upon the reasons of reduction,
 “ and the defences arising out of the production of the
 “ decree of the 5th March 1782, and to proceed further
 “ as to his Lordship shall seem proper; but sist pro-
 “ cess in the meantime relative to the production of
 “ the writings called for other than the said decree
 “ already produced, and until the reduction of the

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No. 40. “ same ; and further find the defender not entitled to
 27th August “ the expenses of the present discussion.”

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A record having been closed, and the case having come before Lord Moncrieff, he ordered the question to be argued in cases, which he reported to the Court, accompanied by this note :—“ It is impossible for the
 “ Lord Ordinary not to feel that a considerable pro-
 “ portion of the case given in for the pursuer is
 “ occupied with matter which, in a correct view of
 “ the state of the cause, is irrelevant to the proper
 “ question at issue. The pursuer undisguisedly avows,
 “ that he is discussing precisely the question, whether
 “ the decree of 1782 was right upon its merits or not?
 “ After the deliberate judgment of the Court, of 31st
 “ January 1827, sisting process in regard to the validity
 “ of the title deeds by which the defender holds the
 “ estates, the Lord Ordinary cannot think that this is
 “ a correct proceeding ; for the merits of the question
 “ as to the validity of those title deeds are in a great
 “ measure, if not absolutely, the same with the merits
 “ of the questions involved in the decree 1782 ; and,
 “ therefore, all discussion of that question seems to be
 “ excluded, until the decrees as res judicata shall be
 “ taken out of the way.

“ The pursuer maintains indeed, that, in insisting for
 “ reduction of the decree on the ground that it was a de-
 “ cree in his absence, and on minority and lesion, he is
 “ entitled and bound to show that it was erroneous in
 “ itself, and that he suffered lesion by it. But there is
 “ manifest fallacy in this reasoning. The question is,
 “ whether the decree is to stand as res judicata of the
 “ matters determined by it or not ? Unless relevant
 “ grounds be made out for showing that it does not con-

“ stitute *res judicata*, it is incompetent to discuss the ques-
 “ tion which under it is finally and irreversibly determined.
 “ But if good grounds be shown for finding that it is not
 “ *res judicata*, the decree may be reduced to this effect ;
 “ and then, but then only, the pursuer will be entitled to
 “ try the question anew, in the same manner as if that
 “ decree had not been pronounced. It is true that a
 “ party who brings a reduction of a decree pronounced
 “ in absence may be called upon, after he has established
 “ that it is a decree in absence against which he is
 “ entitled to be reponed, to show that the decree is
 “ erroneous on its merits, before he can obtain either
 “ *absolvitor* or decree in his own favour ; because all
 “ that he is entitled to is, to be placed in the same
 “ situation in which he was before the decree was pro-
 “ nounced. But the point which the pursuer has here
 “ to prove is the preliminary point, that this decree is
 “ liable to reduction at his instance as a decree in
 “ absence. Until he establishes this, any discussion of
 “ the merits of it is incompetent. If he establishes it,
 “ the whole merits will be open to him, because the
 “ plea of *res judicata* will then be repelled. In the
 “ same manner, when the pursuer pleads minority and
 “ lesion, he is entitled to assume the lesion by the
 “ facts of his being deprived of the estate ; and, though
 “ he may also assume in argument that he is deprived
 “ of it by an erroneous judgment, his opponent is not
 “ bound to discuss with him the question, whether it
 “ was erroneous, or pronounced according to a just
 “ view of the law, until it be first determined that there
 “ is a competent and relevant plea of minority, which
 “ shall have the effect of preventing that decree itself

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- No. 40. “ from standing as a final determination of the ques-
27th August “ tion.
1833. “ The Lord Ordinary is therefore humbly of opinion,
MAULE “ that the manner in which the pursuer has treated the
v. “ case in the present state of the process is very in-
MAULE. “ correct, and may very possibly produce confusion in
 “ the proceedings.
 “ On the merits of the only question really at issue,
 “ the Lord Ordinary shall only make a few remarks.
 “ 1. He is of opinion that the decree of 1782 cannot
 “ be considered as a decree in absence. The pursuer
 “ seems to grant that the question which was there
 “ tried might have been effectually tried in the com-
 “ petition with Lieutenant Thomas Maule, the imme-
 “ diate heir of entail, alone, and that a judgment against
 “ him (laying aside the question as to the effect of the
 “ decree arbitral) would have been effectual against the
 “ pursuer. But the question was tried in foro conten-
 “ tioso with Lieutenant Thomas Maule, and as to him
 “ it was no decree in absence. The pursuer was also
 “ called in the action of reduction, and it is said to
 “ be a decree in absence against him, because no tutor
 “ ad litem was appointed. But, whether his being so
 “ called can alter the effect in foro with the proper
 “ party or not, (and the Lord Ordinary does not think
 “ it can alter it,) there is no doubt that appearance
 “ was made for the pursuer and his administrator in
 “ law; and as there was then at least no adverse interest
 “ between him and his father, there was no room for
 “ the appointment of a tutor ad litem; and such an
 “ appointment, it is thought, would have been altogether
 “ incompetent. A decree which was obtained on full

“ discussion by the first counsel at the bar appearing
 “ for both these parties can never be a decree in
 “ absence with regard to either of them, whatever other
 “ objections it may be liable to as forming *res judicata*.
 “ There is no room in the present case for the principle
 “ adopted in the case of *Sheuchan*; and to apply it,
 “ indeed, to such a case, would be to hold that the
 “ father can in no case act effectually as the tutor of
 “ his son.

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“ 2. The Lord Ordinary is of opinion, that the plea
 “ of minority and lesion is equally inadmissible; for, 1,
 “ The pursuer brought no reduction within the quadri-
 “ ennium utile, to which the law has expressly con-
 “ fined the rights of a minor to complain on this
 “ ground of acts done in his minority. But, 2, The
 “ thing which he has to set aside is a decree of this
 “ Court, on trial of a question of law; and the Lord
 “ Ordinary is not aware that such a decree in *foro* is
 “ liable to reduction on minority and lesion, without
 “ some other ground of objection to it than merely
 “ that the party says that he will now show that it
 “ ought to have been different, the facts and the law
 “ remaining exactly as they were, and where it is not
 “ stated that the proper allegations in fact and law
 “ were not made. See *Ersk.* 1. 7. 38.

“ 3. The pursuer, however, has another view of his
 “ case. The judgment of the Court in 1782 was sub-
 “ ject to appeal; but no appeal was entered. The
 “ pursuer says that his father, Thomas Maule, aban-
 “ doned his right of appeal by a collusive compromise
 “ for a sum of money; and he infers that therefore
 “ the judgment of the Court ought not to operate as
 “ *res judicata* against the other heirs of entail. This

No. 40. “ plea is to the point, whether relevant or well founded
27th August “ or not; but it ought not to be mixed with questions
1833. “ about the pursuer’s personal connexion with the
MAULE “ decree arbitral, or its effects against him as a decree
v. “ or agreement. Supposing it not to affect him in any
MAULE. “ way, the point which he has to make out is, that,
 “ supposing that the judgment of the Court in foro
 “ would have been *res judicata* if Lieutenant Maule
 “ had simply acquiesced in it without appealing, the
 “ effect of it in this respect is destroyed by the com-
 “ promise of the suit. And it will be necessary for
 “ him to satisfy the Court, both that it prevented the
 “ judgment from becoming final at the time, and that
 “ he is not barred from now complaining of it by not
 “ having taken his remedy in due time; for the point
 “ stated by the defender is certainly material, that the
 “ pursuer brought no action for reducing the decree,
 “ not only till many years after he was of age, but till
 “ long after he raised his action for reducing the decree
 “ arbitral, and even more than five years after that
 “ decree was finally reduced.

 “ This part of the case appears to involve considera-
 “ tions of very great importance to the law. The Lord
 “ Ordinary doubts whether, from the very singular
 “ course which the pleadings have taken in these papers,
 “ the arguments of the parties sufficiently meet one
 “ another with regard to it. But perhaps it may
 “ appear to the Court that there is enough for the
 “ decision of the question. The Lord Ordinary has
 “ thought it his duty to frame these notes, merely in
 “ order to show where, in his humble opinion, the
 “ merits of the case hinge. The Court will have at the
 “ same time to consider the effect of the judgment of

“ the House of Lords of 26th May 1826, in regard to
 “ this question of *res judicata*.”

The Court, after allowing the parties to lodge additional cases, remitted them for the consideration of the other Judges, who delivered the following opinions :—

Lords Justice Clerk, Glenlee, Cringletie, and Moncreiff.—“ The pursuer, by his summons raised on the
 “ 18th of August 1826, insists for reduction of a decree
 “ of this Court, pronounced, upon full discussion of the
 “ merits of the cause between the parties proper for trying the questions at issue, on the 1st March 1782 ;
 “ and he further demands reduction of the titles, by
 “ which the defender and his father have possessed the
 “ estates mentioned in the summons before and since
 “ the date of that decree, and which were thereby found
 “ and determined to be valid rights.

“ The present question is, whether the decree thus
 “ challenged does or does not constitute *res judicata*, to
 “ the effect of excluding all consideration of the questions which were decided by it? or, whether any
 “ relevant grounds have been shown for reducing it
 “ after so long a period, so as to lay open the whole
 “ merits of those questions regarding the validity of the
 “ defender’s title deeds.

“ We are clearly of opinion, that, in this state of the
 “ question, it is altogether incompetent to enter at all
 “ into the merits of the judgment pronounced by the
 “ Court in 1782 ; and that the question, whether the
 “ decree is *res judicata* or not, is a preliminary question,
 “ which must depend on other matters of fact and law.
 “ For unless relevant grounds have been shown for
 “ setting aside that decree as a decree legally pronounced,
 “ or for opening it up as not final, it must be considered

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- No. 40. “ as having irreversibly adjudged and determined the
 27th August “ questions involved in it.
 1833. “ The facts on which the question, whether this decree
 MAULE “ constitutes *res judicata* or not, depends, are not very
 v. “ numerous, and are not involved in any perplexity.
 MAULE. “ The pursuer founds his title in the present action
 “ on certain deeds of entail executed in 1730, under
 “ which he says his father, Lieutenant Thomas Maule,
 “ was the immediate heir in the estates of Kelly and
 “ Ballumbie on the death of the Earl of Panmure in
 “ 1781. Some proceedings had been taken before the
 “ death of Lord Panmure; and, in particular, Lord
 “ Panmure had brought a declarator against Lieutenant
 “ Thomas Maule, to have it found that he had an un-
 “ limited right to the estates, and that the entails were
 “ not binding on him; and separately, a reduction for
 “ setting aside those deeds, in which the present pursuer,
 “ as well as his father, was called as a party. After
 “ Lord Panmure’s death, the question as to the rights
 “ to these estates was further raised; first, by a reduction
 “ at Lieutenant Maule’s instance against Lord Dal-
 “ housie and the present defender; and, secondly, by a
 “ competition of *briefes* between Lieutenant Maule on
 “ the one part, and Lord Dalhousie as the defender’s
 “ administrator in law on the other. These various
 “ processes having been conjoined, appearance was
 “ made for all the parties under them; and there is no
 “ doubt that the entire question as to the validity and
 “ subsistence of the entails, and as to the validity of the
 “ defender’s titles as opposed to them, was fully dis-
 “ cussed by the first counsel then at the bar, and was in
 “ all respects aptly and legally brought to issue, and
 “ decided by the Court in favour of the defender.

" The same interlocutor found, that Lieutenant	No. 40.
" Maule had right to certain leases of the parks of	27th August
" Panmure and Brechin in virtue of separate entails	1833.
" applicable to them. And against this judgment Lord	MAULE
" Dalhousie entered an appeal to the House of Lords.	v.
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" A transaction was then entered into in the form of
 " a submission and decree arbitral, by which Lieutenant
 " Maule, for himself and his son, surrendered his right
 " by this judgment as to the leases, and became bound
 " not to enter a cross appeal against the judgment
 " regarding the estates; and Lord Dalhousie, for him-
 " self and the defender, became bound to pay a sum of
 " 3,500*l.* to be settled in a particular way. That
 " money was paid or invested as agreed upon.

" The pursuer was served heir to his father, came of
 " full age, and, for many years after that event, received
 " the interest of the money invested, without challenging
 " the decree arbitral or raising any doubt concerning
 " the conclusiveness of the decree in 1782 as to the
 " estates.

" In 1810 he brought a reduction of the decree
 " arbitral on various grounds, to which it is unnecessary
 " to advert. As far as we have seen, the single ground
 " on which the House of Lords ultimately proceeded
 " was, that from the terms of the deed itself it appeared
 " that it was not a decree arbitral, but merely a form
 " by which Lord Dalhousie and Lieutenant Maule
 " made an agreement between themselves. This first
 " action, concluding for reduction of the decree arbitral,
 " related to the leases alone; and the summons con-
 " tained further conclusions, to have it found that the
 " pursuer had right to these leases, and for removing
 " against the defender.

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“ The Court by a majority assoilzied the defender.
 “ But it is believed, that even those who differed from
 “ that judgment were then of opinion, that, though the
 “ decreet arbitral were set aside at his instance, the
 “ effect could only be to place the defender in the
 “ same situation in which he stood before it was pro-
 “ nounced.

“ On appeal the House of Lords found, that the
 “ submission and decree arbitral was only a form
 “ adopted by which an agreement between Thomas
 “ Maule and Lord Dalhousie was concluded, and re-
 “ mitted the cause.

“ The Court afterwards pronounced a judgment in
 “ general terms sustaining the defences, though there is
 “ no doubt that the whole merits of the cause had been
 “ pleaded, and were intended to be decided, on the
 “ footing of the previous judgment of the House of
 “ Lords.

“ On a second appeal the House of Lords reversed
 “ the interlocutor (1819), so far as was thought incon-
 “ sistent with that judgment, and sustained the defences
 “ generally ; and ordered, that the decree arbitral should
 “ be reduced ‘ as a decree arbitral affecting any rights
 “ ‘ of the appellant.’ It declared, that the judgment of
 “ the 1st March 1782 was not to be considered as final
 “ and conclusive against the respondent with respect to
 “ the leases ; and therefore, as to so much of the pur-
 “ suer’s action as sought a declaration of his rights to
 “ the leases, affirmed the judgment, without prejudice
 “ to any question between parties in any other action
 “ as to any other property comprised in the deeds of
 “ taillie mentioned.

“ The pursuer holds this judgment to have been a

“ decree reducing the transaction called a decree arbitral
 “ to all intents and purposes, so far as ‘ affecting any
 “ ‘ rights of him the appellant.’ It probably was so
 “ intended; and we think it may now be assumed to
 “ have this effect. But it is to be observed, that up to
 “ this time the pursuer had brought no regular action,
 “ either for claiming the estates of Kelly and Ballumbie,
 “ or for setting aside the decree of the Court in 1782
 “ regarding them, though he had unsuccessfully at-
 “ tempted to repeat a summons as to these estates in
 “ the action regarding the leases; but it is very evident
 “ to us, that, if the views now maintained by him had at
 “ all occurred at an earlier period, he must have laid
 “ claim to the estates in his very first proceeding.

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“ But, apparently in consequence of the finding of
 “ the House of Lords, that the decree 1782 was not
 “ conclusive against the defender as to the leases, the
 “ pursuer now took up the idea that it could not be
 “ conclusive as to him with regard to the estates. We
 “ are of opinion, that there is no correct analogy
 “ between the two things; but, if there were a correct
 “ analogy, the pursuer does not appear to have availed
 “ himself of it in a competent manner.

“ He did not attempt to enter any appeal to the
 “ House of Lords at this time against the judgment in
 “ 1782, neither did he bring any reduction of it; but
 “ he brought before the First Division of the Court
 “ simply an action founding on the old entails, and de-
 “ manding reduction of those title deeds which had
 “ been solemnly adjudged to be valid by that decree.
 “ The defence stated was *res judicata*, which was sus-
 “ tained by the Court.

“ On a third appeal the House of Lords pronounced

No. 40. “ the important judgment of 26th May 1826, ordering
 27th August “ that the interlocutors be affirmed with respect to the
 1833. “ estates of Kelly and Ballumbie, and the bond for
 MAULE “ 9,000*l.* in the ‘ said interlocutors mentioned, so far as
 v. “ ‘ said interlocutors find that all right and interest in
 MAULE. “ ‘ the said estates and bond, which the appellant claimed
 “ ‘ under the summons of reduction and declarator in the
 “ ‘ said interlocutors mentioned, were totally excluded,
 “ ‘ and the subject matter of the action then before the
 “ ‘ Court, as to such estates and bond, was *res judicata*
 “ ‘ by the judgment contained in the decret of the
 “ ‘ Court of Session of the 5th March 1782, in the said
 “ ‘ interlocutors mentioned; inasmuch as it appears
 “ ‘ to their Lordships that it was not competent for the
 “ ‘ appellant, by the summons of reduction and de-
 “ ‘ clarator in the said interlocutors mentioned, to
 “ ‘ impeach such decret of 5th March 1782, so far as
 “ ‘ the same respected such estates and bond, and such
 “ ‘ decret has not been impeached by reclaiming peti-
 “ ‘ tion or appeal, or any other proceeding competent
 “ ‘ to impeach the same.’

“ This appears to us to have been a conclusive judg-
 “ ment on the case as it stood before the House of
 “ Lords. Neither do we find any reservation in it. It
 “ seems just to determine the point thus: that the
 “ pursuer, not having taken any competent form of
 “ impeaching the decree 1782, the House then held
 “ that decree to be *res judicata* to exclude the claim
 “ made by him in the action to the estates of Kelly and
 “ Ballumbie.

“ The pursuer, however, now raised the present ac-
 “ tion for reducing the decree 1782, at the distance of
 “ forty-four years from its date. The nature of the

“ action, and the proceedings in it, are fully detailed in
 “ the papers of the parties.

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“ In this state of the case, we are humbly of opinion
 “ that the decree 1782 does constitute *res judicata*
 “ against the pursuer in the present action.

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“ It is evident that the decree 1782 must be con-
 “ sidered as *res judicata*, unless the pursuer has shown
 “ legal grounds for impeaching it as such. It was pro-
 “ nounced in a regular process, competent for the
 “ decision of the question, fairly conducted, upon full
 “ argument, and by the competent tribunal. It was
 “ not impeached by reclaiming petition nor by appeal;
 “ and forty-four years went over it before this reduction
 “ was brought. All these points are clear. But the
 “ pursuer maintains various grounds of reduction.

“ 1. He says that it was a decree in absence as to him.
 “ We are of opinion, that it was not a decree in
 “ absence; and that, though it had been so, the plea is
 “ irrelevant. The pursuer was a party to the suit by
 “ his administrator in law having been called in one of
 “ the actions which was conjoined with the rest; the
 “ merits of the case were fully pleaded in his behalf, the
 “ interest of his father and himself precisely coinciding;
 “ and we are of opinion, that, in such circumstances,
 “ there was no necessity for the appointment of a tutor
 “ *ad litem*, and there would have been no competency
 “ in such a measure. But, at any rate, we are clearly
 “ of opinion, that the plea is irrelevant. The question
 “ was, whether the entails were subsisting? Thomas
 “ Maule was the immediate heir of entail. He un-
 “ doubtedly discussed the question in *foro contentioso*;
 “ and we are of opinion, that such a judgment pro-
 “ nounced *causa cognita* against the immediate heir of

- No. 40. “ entail, who would have been the *verus dominus* if the
 27th August “ entail subsisted, does constitute *res judicata* against
 1833. “ all other heirs claiming under the same entail.
- MAULE “ 2. He pleads minority and lesion. We are of
 v. “ opinion that this plea is not well founded. The
 MAULE. “ privilege of a minor to bring such a reduction must
 “ be exercised within the quadriennium utile, which has
 “ not been done in this case. Even if this rule could
 “ be changed by the pursuer’s allegation of his ignorance
 “ of the nature of the decree arbitral, (of which, how-
 “ ever, we have seen no evidence,) he must at least have
 “ been bound to bring the action as soon as he knew
 “ the facts. But neither was this done. We further
 “ entertain great doubt whether this ground of reduc-
 “ tion could be applied to the effect of reducing a decree
 “ of this Court in *foro contentioso*, even if the pursuer
 “ had been the primary or the only party to it. But
 “ we think it very clear that it is altogether inadmissi-
 “ ble as a ground for reducing a decree which was
 “ competently pronounced against another party who
 “ was the first heir of entail fully in *titulo* to try the
 “ question with effect, and who was of full age.
- “ 3. The pursuer maintains, that Thomas Maule
 “ having by the decree arbitral bound himself and the
 “ pursuer not to enter a cross appeal to the House of
 “ Lords against the judgment regarding the estates, the
 “ effect of this must be to take away the operation of
 “ the judgment as *res judicata*, and to entitle him even
 “ now to reduce it.
- “ This is the only point in which we think that there
 “ is any difficulty in the case. But we are of opinion
 “ that the plea is not solid.
- “ The decree arbitral has been found to have been

“ merely the form of an agreement, and it has been
 “ reduced as a decree arbitral affecting the rights of the
 “ pursuer. Under this decision he claimed the leases.
 “ But the Court and the House of Lords held, on the
 “ plainest principles of law and justice, that the effect
 “ of his challenging the decree arbitral successfully in
 “ that point could only be to oblige the defender to
 “ take the place, as to these leases, which he would
 “ have held if no such transaction had been made—
 “ that is, with an appeal actually entered against the
 “ judgment; or, in other words, to discuss the merits
 “ of the judgment as still open. It appears to us that
 “ the law and equity of this proceeding are manifest.
 “ What did the pursuer complain of? Of nothing
 “ but that by the decree arbitral Thomas Maule had
 “ compromised the pursuer’s right as an heir of entail
 “ to the leases, which had been found by the interlocu-
 “ tor to belong to Thomas Maule and the heirs of entail
 “ in their order. But if he was reponed against this
 “ effect of the decree arbitral, there could be neither
 “ law nor equity for holding that the defender should
 “ not be also reponed against the abandonment of his
 “ appeal by Lord Dalhousie on the faith of the com-
 “ promise. We think that it was the inevitable
 “ consequence; and so the House of Lords conclusively
 “ determined by the judgment of 1819.

“ But the position of the parties with regard to the
 “ estates was and is totally different. As to them the
 “ defender held the judgment of the Court. If Thomas
 “ Maule chose to acquiesce in the judgment he had a
 “ right to do so. If he had appealed, and abandoned
 “ the appeal, he had a right to do so. Neither could
 “ he have challenged any agreement for himself, en-

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- No. 40. “ gaging not to appeal ; and indeed the decree arbitral
 27th August “ has not been reduced so far as it affected his rights,
 1833. “ the judgment of 1819 being expressly applied to it
 MAULE “ only as ‘ affecting any rights of the appellant.’ Now,
 v. “ the defender never challenged the decree arbitral. He
 MAULE. “ is asking nothing of the pursuer. He is not impeach-
 “ ing any part of the agreement which was made for
 “ him. It is impossible therefore to apply to him the
 “ ground of equity which the House of Lords sustained
 “ against the pursuer in the case of leases. The pur-
 “ suer was challenging the decree arbitral, and yet
 “ holding the defender bound by the judgment of the
 “ Court, which stood appealed at the time, and only
 “ became final by the force of the same decree arbitral.
 “ The defender is in no such position. He was and is
 “ willing to stand by the decree-arbitral in all points.
 “ And the plea of the pursuer seems really to be, that,
 “ because he himself has reduced the decree arbitral,
 “ with a different view, the defender must lose the
 “ benefit of the judgment of this Court, which he pre-
 “ viously held.
- “ This view of the dissimilarity of the two cases is
 “ not removed by the circumstance that, by the decree
 “ arbitral, Thomas Maule renounced, for himself and
 “ the pursuer, the right to enter a cross appeal. If
 “ this had been thought to make the cases parallel, the
 “ pursuer must have been admitted at once to impeach
 “ the original merits of the decree in 1782. But,
 “ beyond all doubt, the House of Lords have expressly
 “ decided the reverse ; and as that House has definitively
 “ determined that the cases are not parallel, we humbly
 “ think that it is now incompetent for the pursuer to
 “ maintain, and would be incompetent for us to hold,

“ that the decree of 1782 is not *res judicata*, on any
 “ supposition that they are alike, or that the House of
 “ Lords should have determined otherwise than they
 “ have done. We think, however, that the difference
 “ is still very plain in principle. The defender is not
 “ challenging the decree; and though the pursuer, who
 “ challenges it as heir of entail, may overcome that
 “ which was incompetently done by his ancestor in the
 “ surrender of the leases, it does by no means follow, in
 “ our apprehension, that the defender is to be compelled
 “ to open up the lawful decree which he holds in his
 “ favour, merely because the party in the immediate
 “ right at the time had consented to let it stand with-
 “ out an appeal.

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“ In the case of Porterfield, lately before the Court,
 “ the question was fully tried by the late Sir Michael
 “ Shaw Stewart; and after several judgments had been
 “ pronounced, and the case was final in this Court, he
 “ intimated in writing to his opponent, Mr. Corbet
 “ Porterfield, that he was satisfied with the trial of the
 “ case, and did not intend to appeal, and gave up the
 “ benefit of an agreement by which the expenses of both
 “ parties were to be paid from the rents till a final
 “ judgment in House of Lords. This did not interfere
 “ with the right of any other heir of entail to appeal;
 “ and the next heir has done so. But if no appeal had
 “ been entered within the period of five years there
 “ can be no doubt, we apprehend, that the judgment of
 “ this Court would have been *res judicata* against all
 “ parties whatever.

“ The question here is, whether the case is made
 “ different by the circumstance of the pursuer having been
 “ made a party to the submission. And we can very

No. 40. “ well see, that if the pursuer had proposed to appeal
27th August “ the case in due time, and had been met by the clause
1833. “ in the decree arbitral as a bar to such a proceeding,
MAULE “ he must have been reponed against that as soon as
v. “ the decreet arbitral was found not binding on him.
MAULE. “ But laying aside that case, it is not easy to see that,
 “ in the actual circumstances of his proceedings, he was
 “ placed in any worse situation than he would have
 “ been if he had not been a party either to the actions
 “ or to the decreet arbitral. He says, indeed, that for
 “ a long time he thought himself bound by the decreet
 “ arbitral; and it has been suggested, that thereby he
 “ was prevented from appealing in proper time. We
 “ are much afraid that this view receives very little
 “ support from the facts of the case, more especially
 “ as the idea of either appealing against the judgment,
 “ or attempting to reduce it, or even claiming the
 “ estates at all, did not occur to him for so very many
 “ years after he brought his reduction of the decreet
 “ arbitral as to the leases. But giving the utmost
 “ weight to the consideration, and granting also the
 “ principle, however doubtful, that in equity he might
 “ still be permitted to challenge the judgment, final
 “ though it was against Thomas Maule, we can see no
 “ ground for holding that this right could be altogether
 “ without limits, and that, after he knew all that he
 “ yet knows, he should still be allowed to let the decree
 “ stand unchallenged, and at last bring his reduction
 “ after sixteen years of further acquiescence. His first
 “ action was brought in 1810. He did not even claim
 “ the estates till 1821; and he did not bring the reduc-
 “ tion of the decree 1782 till 1829. It would be a
 “ very great stretch of equity, but surely it would be

“ the utmost latitude which could be given to it, on the
 “ ground of his thinking himself bound by the decree
 “ arbitral, that he should be allowed still five years
 “ more to challenge the judgment, after he saw cause
 “ to object to the validity of the decree arbitral. But
 “ granting even this, he lost the opportunity.

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“ The pursuer, however, says further, that he waited
 “ till the decree arbitral should be reduced. It may
 “ well be doubted whether any party can be entitled to
 “ allege such a thing as an excuse for not exercising a
 “ right claimed as matter of equity as soon as he him-
 “ self believed that no legal obstacle could stand against
 “ him. But supposing even this to be overcome, the
 “ decree arbitral was reduced in 1819. Still there was
 “ no attempt to challenge the judgment of 1782. The
 “ pursuer, indeed, brought an action claiming the
 “ estates. He was met by the plea of *res judicata*,
 “ which gave him fair warning. The Court found it to
 “ be *res judicata*, which should still more have put him
 “ upon his guard. The House of Lords, in 1826,
 “ affirmed the judgment; and it was only after this that
 “ the present action was raised.

“ By that judgment the decree 1782 stands clearly
 “ found to be *res judicata*, excluding the pursuer's
 “ claim to these estates. On what ground then is it to
 “ be overcome, in regard particularly to the last period
 “ from 1819 to 1826? The pursuer has nothing to
 “ state but this, that he acted under the impression,
 “ that because when he challenged the decree arbitral
 “ as to the leases the pursuer was admitted to defend
 “ his titles by trying the merits of the judgment regard-
 “ ing them, without bringing any reduction, the pur-
 “ suer should be equally entitled to challenge the judg-
 “ ment as to the estates without a reduction; and that

- No. 40. “ he only discovered his mistake when the judgment of
 27th August “ 1826 was pronounced. We do not think that this
 1833. “ can be received even as a matter of fact, considering
 MAULE “ that this Court had sustained the plea of *res judicata*.
 v. “ But, supposing it were true, is it relevant? Sup-
 MAULE. “ posing it granted that even in 1819 the pursuer
 “ might have challenged the decree 1782, if he did so
 “ immediately, or even within five years, what does the
 “ plea for the delay amount to, but that the pursuer
 “ took a false view of the law, and has, even in this last
 “ stage of a forty years delay to impeach the judgment
 “ of this Court, lost his opportunity by an error in
 “ law? We apprehend that the pursuer had no good
 “ ground to make the assumption which he says he
 “ did. He was told by the interlocutor of the Court that
 “ he had not. But if he chose to act upon his own advice
 “ or any other, we apprehend that that can furnish no
 “ reason for now relieving him of the consequence of
 “ his not having taken his appeal or brought his reduc-
 “ tion in due time.
- “ The case of the pursuer, therefore, against the
 “ plea of *res judicata* appears to us to consist in a
 “ series of excuses for not having done that which he
 “ was bound by law to do in order to preserve his
 “ right to complain of the judgment. The case is no
 “ doubt special; but we cannot avoid looking at the
 “ very long period which has elapsed between the date
 “ of the decree and the action for reducing it. We
 “ know of no similar case in which a decree solemnly
 “ pronounced in *foro* has been allowed to be opened up
 “ at so great a distance of time. And as it certainly
 “ cannot be held that, under any of the peculiar features
 “ of this case, the pursuer’s right to challenge became
 “ absolutely indefinite as to time, we are humbly of

“ opinion that, after the utmost possible effect is given
 “ to each of his successive apologies for the delay, he must
 “ be considered as at last foreclosed by the course of pro-
 “ ceeding which he chose, with his eyes open, to adopt.”

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“ *Lords Meadowbank, Mackenzie, Medwyn, Core-*
 “ *house, and Newton.*—In 1782 certain actions rela-
 “ tive to the succession of Earl Panmure depended in
 “ this Court, in which the late Thomas Maule, the
 “ pursuer’s father, on the one side, and the defender,
 “ and the Earl of Dalhousie as his administrator in law,
 “ on the other side, were parties. These actions related
 “ to the estates of Kelly and Ballumbie, to a bond for
 “ 9,000*l.*, and to two long leases of parts of the estates
 “ of Brechin and Panmure, all of which Thomas Maule
 “ claimed as heir of entail and provision under certain
 “ destinations executed in 1730 by Harry Maule, father
 “ of Lord Panmure, and others. It seems unnecessary
 “ at present to specify the nature of those actions, farther
 “ than to mention, that in some of them Thomas Maule
 “ appeared for his own behoof as the heir entitled to
 “ possession of the subject, and in others not only for
 “ his own behoof, but also as administrator in law for
 “ the pursuer, and his other children then in infancy,
 “ the nearest substitutes.

“ All those actions were conjoined, and on the 5th
 “ of March 1782 the Court of Session pronounced an
 “ interlocutor, by which they decided in favour of the
 “ defender as to the estates of Kellie and Ballumbie
 “ and the bond for 9,000*l.*, and in favour of Thomas
 “ Maule as to the leases. Before that interlocutor
 “ became final the defender and his administrator in
 “ law entered an appeal to the House of Lords, in so
 “ far as regarded the leases; and it appears that
 “ the counsel for Thomas Maule were preparing to

- No. 40. “ enter a cross appeal as to the estates of Kelly and
 27th August “ Ballumbie and the bond. In these circumstances an
 1833. “ agreement was concluded between the defender and
 MAULE “ his administrator in law on the one part, and Thomas
 v. “ Maule, acting for himself, for the pursuer, and the
 MAULE. “ remaining substitutes, on the other part, by which
 “ Thomas Maule for the sum of 3,500*l.* surrendered
 “ his and their right to the leases, part of which sum
 “ was to be paid to himself, and the remainder vested
 “ in trustees for behoof of himself and the substitutes
 “ in their order. Farther it was stipulated, that the
 “ defender’s appeal should be withdrawn, that Thomas
 “ Maule should not enter a cross appeal, and that the
 “ interlocutor of 1782, so far as concerned Kelly and
 “ Ballumbie and the bond, should be allowed to become
 “ final. As the parties entertained doubts whether this
 “ agreement was legal and effectual, it was made to
 “ assume the form of a decree arbitral pronounced on
 “ a pretended deed of submission ; and in virtue of that
 “ decree the defender was afterwards served heir of
 “ entail and provision to the estates and the bond.
- “ The pursuer having survived his father, and
 “ attained the age of majority, received for several
 “ years the interest of the trust funds in the belief
 “ that the submission was regular, and the decree
 “ arbitral effectual. But having come to the knowledge
 “ of the previous agreement, he brought an action
 “ concluding for reduction of the decree arbitral, for
 “ declaring his right to the leases, and for removing
 “ the defender from the subjects held under them.
- “ The Court of Session (9th March 1813) assolizied
 “ the defender. The House of Lords (10th May 1816),
 “ on appeal, remitted for reconsideration, with a finding,
 “ that the submission and decree arbitral were not

“ valid as such, being only a form which the agreement
 “ had been made to assume. The Court of Session
 “ (2d December 1817) again assoilzied; but, on a
 “ second appeal, the House of Lords (10th July 1819)
 “ reversed the judgment in part, reduced the decree
 “ arbitral, found that the interlocutor 1782 was not
 “ final against the defender with respect to the leases,
 “ and affirmed as to the declaratory conclusions of the
 “ pursuer’s action; reserving any question between the
 “ parties in any other action touching the property
 “ contained in the deeds of tailzie.

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“ The cause came back to the Court of Session, and
 “ the pursuer (5th April 1821) raised a new action,
 “ in which he claimed not only the leases, but also the
 “ estates of Kelly and Ballumbie and the bond. It was
 “ pleaded in defence, first, that although the transac-
 “ tion in 1782 had been reduced as a decree arbitral,
 “ it was valid, notwithstanding, as an agreement.
 “ Second, that as the interlocutor of the Court of
 “ Session in 1782, not having been brought under
 “ review either by reclaiming petition or appeal, had
 “ become final, and as it never had been challenged by
 “ reduction, it formed a *res judicata* against the pur-
 “ suer as to the estates and the bond. Both these
 “ pleas were sustained, as appears from the report of
 “ the case (1st of June 1824), and the defender was
 “ again assoilzied.

“ A third appeal was entered; and it is material to
 “ consider the effect of the judgment (26th May 1826)
 “ pronounced upon it. First, the interlocutor of the
 “ Court of Session was affirmed as to the estates and
 “ the bond, on the ground that it was not compe-
 “ tent to impeach the interlocutor of 1782 under the
 “ summons of reduction and declarator then before the

No. 40. “ House. Secondly, it was found that all questions
 27th August “ relative to the leases were open to both parties, and
 1833. “ in express terms that the pursuer had a title to insist
 MAULE “ in his claim for them, which necessarily inferred
 v. “ that the transaction in 1782 was ineffectual, not only
 MAULE. “ as a decree arbitral, but as an agreement or com-
 “ promise. Thirdly, the judgment reserved all ques-
 “ tions between the parties respecting the property,
 “ exclusive of the leases, to be discussed in a competent
 “ manner ; or, what was the same thing, it found that
 “ the reservation in the preceding judgment of the
 “ House of Lords had that effect, the intent and mean-
 “ ing of which previous judgment it declared and
 “ affirmed. And, lastly, it remitted to the Court of
 “ Session to try the rights of the parties as to the
 “ leases.

 “ The pursuer raised a new action (18th August
 “ 1826), concluding for the first time for reduction of
 “ the decree of the Court in 1782, by virtue of the
 “ reservation ; and also for reduction of the deeds exe-
 “ cuted by Lord Panmure, relative to the estates and
 “ the bond which had been the subject of the former
 “ reduction raised in 1821. The Lord Ordinary ap-
 “ pointed the production to be satisfied as to both ; but
 “ the Court (31st January 1827) recalled that inter-
 “ locutor, and limited the production to the extracted
 “ decree 1782. The only question, therefore, at present
 “ is, Whether that interlocutor can be set aside, to the
 “ effect of allowing parties to try the merits of the
 “ question as to the validity of the entails ? or whether,
 “ on the contrary, it forms a res judicata between the
 “ parties, unimpeachable on any of the grounds stated
 “ in the pleadings ?

 “ We agree with the Lord Ordinary that a great

“ deal of matter irrelevant at this stage of the cause
 “ has been introduced into the pursuer’s argument, as
 “ it relates not to the effect of the interlocutor 1782,
 “ but to that of the deeds executed by Lord Panmure.
 “ The first point which properly falls under considera-
 “ tion is, Whether the interlocutor ought to be held
 “ as pronounced in absence, because the pursuer, though
 “ cited in one or more of the conjoined actions, was in
 “ pupilarity, and no tutor ad litem was appointed to
 “ him? We are of opinion that this reason of reduc-
 “ tion is ill-founded. There was no need of such ap-
 “ pointment, as the pursuer’s father was his admini-
 “ strator in law, and acted for him expressly in that
 “ capacity. If there had been an opposition of interest
 “ between his father and himself, the case might have
 “ been different; but there was no such opposition
 “ while the action depended in the Court of Session.
 “ Nay, if the pursuer had not been cited at all, we con-
 “ ceive that the decree obtained against his father, as
 “ the heir of entail entitled to possession, would have
 “ been effectual against him; for whenever the interests
 “ of the heir and the substitutes coincide, he represents
 “ them in every law suit respecting the subjects of the
 “ entail; and a decree pronounced against him, causa
 “ cognita, and without collusion, is effectual against
 “ them. If this were not the law, whenever the rights
 “ of third parties are implicated with those of heirs and
 “ substitutes of entail the matter might become inextri-
 “ cable, and every judicial proceeding regarding them
 “ be rendered insecure.

“ Secondly. Before the interlocutor 1782 became
 “ final the defender had appealed against it to the
 “ House of Lords, and the pursuer’s father was pre-

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No. 40. “ paring a cross-appeal. But the pursuer’s father
27th August “ entered into a transaction with the defender which
1833. “ was ultra vires, if not fraudulent; and, in terms of
MAULE “ that transaction, all legal proceedings were departed
v. “ from, the appeal was withdrawn, the cross appeal was
MAULE. “ not entered, and the interlocutor became final, sub-
“ ject to the alteration made upon it by the decree
“ arbitral. But the whole transaction has been reduced,
“ both as an agreement and a decree arbitral; and
“ the next point is, What is the effect of that reduc-
“ tion, first in law, and then in equity? It is evident
“ in law, that by the reduction the surrender of the
“ leases in reference to the pursuer became ineffectual—
“ the interlocutor 1782, in so far as they were con-
“ cerned, not having been reclaimed against, and the
“ appeal being withdrawn, took effect and stood as a
“ final interlocutor; and the pursuer, therefore, was
“ entitled to extract it as a decree, and by virtue of it
“ to obtain possession of the subjects. But in equity,
“ other considerations are let in. If the agreement
“ had been held altogether fraudulent, and the defender
“ as participant of that fraud, it does not appear how
“ he could have obtained redress. But as it might
“ have been entered into in bonâ fide, though not valid
“ against substitute heirs, whose interest was opposed
“ to that of Thomas Maule, and compromised by his act,
“ —and even if fraudulent, as the defender was a pupil
“ at the time,—it seems fair and reasonable that instead
“ of holding the interlocutor a res judicata against him,
“ he should be reponed against it, and be allowed to try
“ the question anew. In point of form, that could not
“ be done in the shape of a reclaiming petition, the
“ reclaiming days being elapsed; indeed, that mode of

“ procedure had been abolished by the Judicature Act
 “ before the point was stirred in 1826. Neither could
 “ it be reviewed by appeal, for the original appeal had
 “ been withdrawn, and the time for appealing again
 “ had long before expired. The most correct form of
 “ proceeding, it is thought, would have been by an
 “ action of reduction at the instance of the defender,
 “ on the ground that the interlocutor had become final
 “ in consequence of the misconduct of his administrator
 “ in law, and concluding that he should be restored in
 “ integrum, to the effect of retrying his right to the
 “ leases. But that form was dispensed with by the
 “ House of Lords, and parties sent back to try the
 “ right to the leases *de plano* in the pursuer’s declarator.
 “ The reason of this may have been, that the defender
 “ was in possession of the leases, and the pursuer in
 “ petitorio; although that scarcely appears a satisfac-
 “ tory reason, a *res judicata* being no less effectual
 “ as a ground of pursuit than it is as a ground of
 “ defence. But the point is immaterial, since in equity
 “ it was thought right to let parties into the question,
 “ to which of them the leases belonged. That question,
 “ accordingly, has been tried under the pursuer’s decla-
 “ rator and removing; and the result has been, that the
 “ interlocutor of 1782 was altered in part, and in part
 “ affirmed, the pursuer being found entitled to the
 “ lease of Panmure, and the defender to the lease of
 “ Brechin.

“ On the other hand, it is equally manifest, that
 “ though the transaction was reduced, both as a decree
 “ arbitral and an agreement, the interlocutor of the
 “ Court remained a *res judicata* against the pursuer as
 “ to the entails and the bond. The time for reclaiming,

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No. 40. " had reclaiming petitions been still in use, was expired,
 27th August " and for the same reason an appeal was incompetent.
 1833. " But in equity, on the same principle that the de-
 MAULE " fender, having a final interlocutor standing against
 v. " him, was allowed to retry the question as to the
 MAULE. " leases, the pursuer, in the like predicament, was
 " entitled to retry the question as to the entails and the
 " bond. Perhaps it ought rather to be said, that the
 " pursuer's right to be reponed against the interlocutor
 " was still more unquestionable. If there was a fraud
 " in the transaction between Thomas Maule and the
 " defender, it was a fraud for his behoof, while it was a
 " fraud to the prejudice of the pursuer. Farther, the
 " defender's administrator in law had no personal
 " interest in the matter opposed to that of his pupil ;
 " while Thomas Maule compromised his son's interest
 " with a view to promote his own. There would have
 " been no inconsistency, therefore, in holding that the
 " pursuer was entitled to a restitutio in integrum, while
 " the defender was not ; but it would plainly be iniqui-
 " tous to bestow that privilege on the defender if it was
 " withheld from the pursuer.

" For these reasons we are of opinion that the right
 " of restitution against the interlocutor of the Court in
 " 1782 is mutual ; and as it formed no *res judicata* in
 " favour of the pursuer, neither can it form a *res*
 " *judicata* against him.

" It remains to be considered, whether this opinion be
 " in conformity with the judgments of the House of
 " Lords already pronounced, and obligatory upon the
 " parties. And here it is manifest that the judgment pro-
 " nounced in 1819, when Lord Eldon presided, pro-
 " ceeds on the principle of mutual restitution. While

“ it affirms the interlocutor appealed from as to the
 “ leases, it contains an express reservation of ‘any
 “ ‘question between the parties in any other action
 “ ‘touching any property comprised in the deed of
 “ ‘taillie in the pleadings mentioned;’ and his Lordship
 “ observed on that occasion, as appears from an excerpt
 “ from his speech, ‘that the opening of the interlocutor
 “ ‘1782, considering it as not *res judicata*, must be
 “ ‘considered as opening it altogether.’¹

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“ The judgment pronounced in 1826, when Lord
 “ Gifford presided, is equally decisive. It is true that
 “ the House of Lords, on the motion of his Lordship,
 “ affirmed the interlocutor of the Court below, as to
 “ the estates and the bond in the action then before
 “ him, on the ground that the decree 1782 could not
 “ be impeached in that action in which it had not been
 “ brought under reduction, and that it had not been
 “ impeached by reclaiming petition, appeal, or any
 “ other competent proceeding; but the affirmance is
 “ expressly qualified with a declaration that the effect
 “ of the preceding judgment in 1819 was to leave open
 “ all questions, not only as to the leases, but as to the
 “ other property comprehended in the taillie,—that is,
 “ the estates and the bond,—to be discussed in such
 “ manner as the same might be properly discussed in
 “ any future proceeding raised for that purpose. Now,
 “ since reclaiming petition and appeal are incompetent,
 “ the only proceeding in which the question as to the
 “ estates and bond can be properly discussed is a
 “ reduction; the action which accordingly has been
 “ brought.

¹ Speech of Lord Eldon, 28th June 1819.

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“ It is said that the pursuer is barred from insisting
 “ in this action by his delay, as he challenged the
 “ decree arbitral in the year 1810, and allowed seven-
 “ teen years to elapse afterwards before the present
 “ summons was executed. We do not think that the
 “ pursuer is to blame for this delay, and far less that it
 “ can operate as a bar to his action. On the same
 “ ground that the defender was allowed without a
 “ reduction to discuss his right to the leases, notwith-
 “ standing the interlocutor of 1782, in point of form,
 “ was final, the pursuer had reason to believe that he
 “ would be allowed, without a reduction, to discuss his
 “ right to the estates and the bond, the same inter-
 “ locutor 1782 having been declared to be equally open
 “ as to both parties, and in reference to all the property
 “ contained in the entails. It was not until the date
 “ of the judgment 1826 that he learned that this form,
 “ dispensed with in the case of the defender, was
 “ deemed requisite in his case; and, however well
 “ founded the distinction may be, it certainly was not
 “ so obvious that the fault of overlooking it should be
 “ visited with a penalty so severe.

“ The last point for consideration is the plea of
 “ minority and lesion, on which the interlocutor 1782
 “ is challenged. It is possible that both that inter-
 “ locutor and the decree arbitral or agreement might
 “ at one time have been brought under reduction on
 “ that ground; but the quadriennium utile having long
 “ since elapsed, minority and lesion per se can no
 “ longer be competently pleaded to that effect either
 “ against the one or the other. The only plausible way
 “ of putting the argument is, that the pursuer, being
 “ deceived by the collusive decree arbitral, refrained

“ from bringing his reduction *ex capite minoritatis*,
 “ and that the defender, being participant in the fraud,
 “ is barred by a personal exception from pleading the
 “ lapse of the *tempus utile*. But we think the argu-
 “ ment, even in that shape, untenable; for the decree
 “ arbitral was at least as hurtful to the pursuer as the
 “ judgment of the Court which preceded it, and the
 “ one was just as liable to reduction on this ground as
 “ the other. No reason can be assigned why the decree
 “ arbitral, whether fair or fraudulent, should have pre-
 “ vented the pursuer from having recourse to this
 “ remedy if he had suffered lesion in proceedings.
 “ But, in truth, the consideration of the question is
 “ superseded by the reduction of the decree arbitral,
 “ which at once opens the way for retrying the question,
 “ whether the pursuer was lesed or not; and, in the
 “ circumstances of this case, a *restitutio in integrum* is
 “ a much more effectual remedy than an action of
 “ reduction *ex capite minoritatis*.

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“ It is said that a distinction exists between the case
 “ of the defender and the pursuer in reference to the
 “ interlocutor 1782, because the defender had actually
 “ entered his appeal against it, while Thomas Maule
 “ had not entered a cross appeal, either on his own
 “ part, or on that of his son, that it is not presumable
 “ he would have done so, and if he had not, the inter-
 “ locutor would have been final, independently of the
 “ agreement. We think it a sufficient answer to this
 “ remark, that Thomas Maule, having the power to
 “ appeal, became bound by the agreement not to appeal.
 “ In *hoc statu*, there is just as much reason to presume
 “ that the defender would have withdrawn his appeal
 “ after it was entered, as that Thomas Maule would

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“ have refrained from entering a cross appeal, because
 “ at this stage of the proceedings we have no means of
 “ forming an opinion whether the interlocutor 1782
 “ was better founded with regard to the estates and the
 “ bond than it was with regard to the leases ; the same
 “ equity which interposed to restore the defender against
 “ a final interlocutor, because his appeal had been with-
 “ drawn in consequence of an invalid agreement, must
 “ confer the like privilege on the pursuer, who was tied
 “ up by it from entering a cross appeal.

“ We come to the conclusion, therefore, that the
 “ interlocutor 1782 ought not to be held as a *res judi-*
 “ *cata* against the pursuer ; and, there being no title
 “ therefore to exclude, that the defender should be or-
 “ dained to satisfy the whole production, with a view to
 “ the merits being discussed.”

Lord Fullerton.—“ The determination of the question
 “ now before the Court depends, in a great measure,
 “ on the legal effect and import of the procedure which
 “ has taken place, and the judgments which have been
 “ pronounced in the former actions between the parties.

“ But those actions have been so complicated, and
 “ those judgments, both in this Court and in the House
 “ of Lords, have been so various, that it is a matter of
 “ some difficulty to ascertain, separately, what points
 “ were fixed by each successive judgment, and of still
 “ greater to seize their combined effect ; so that it is
 “ with some diffidence I give this opinion, founded as
 “ it is on a view of the previous procedure, in taking
 “ which it is not impossible that particulars materially
 “ affecting the result may have escaped my attention.

“ The decree now sought to be reduced formed part
 “ of a judgment pronounced by the Court of Session on

“ the 5th March 1782 in certain conjoined actions
 “ depending between Lieutenant Maule, the father of
 “ the pursuer, and the defender and his administrator
 “ in law, Lord Dalhousie.

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“ The only one of these actions in which there is any
 “ pretence for considering the present pursuer as directly
 “ a party was that originally raised by Lord Panmure,
 “ and afterwards insisted in by the present defender and
 “ his administrator in law for reducing the entails of
 “ the lands of Kelly and Ballumbie, of the bond for
 “ 9,000*l*., and of the leases of Brechin and Panmure,
 “ founded on by Lieutenant Maule. But it may be
 “ observed, in the first place, that though that summons
 “ seems to have been served personally on the present
 “ pursuer it does not contain his name. It calls merely
 “ Lieutenant Maule, for himself, and as administrator
 “ for his children. And, secondly,
 “ I understand that in none of the conjoined actions
 “ was there any appearance by Lieutenant Maule, as
 “ administrator for his children. By the judgment
 “ pronounced in these conjoined actions, the Court sus-
 “ tained Lieutenant Maule’s claim to the leases of
 “ Brechin and Panmure, but rejected his claim for
 “ Kelly and Ballumbie and the bond for 9,000*l*.

“ While it was competent for either party to
 “ reclaim against that judgment, and certainly while
 “ it was competent for either party to appeal,
 “ the litigation was closed by an agreement between
 “ Lieutenant Maule and the defender and his adminis-
 “ trator in law, afterwards embodied in the form of a
 “ submission and decree arbitral, to which the defender,
 “ then a pupil, was made nominatim a party. By that
 “ transaction it was determined, first, that the judgment
 “ of the Court in Lieutenant Maule’s favour, respecting

No. 40. “ the leases, should be held to be reversed, and the de-
 27th August fender’s claim to the leases sustained. Secondly, that
 1833. “ the appeal entered by the defender against that judg-
 MAULE “ ment should be withdrawn. Thirdly, that the judg-
 v. “ ment of the Court unfavourable to Lieutenant Maule
 MAULE. “ should be adhered to, and ‘ the cross appeal com-
 “ ‘ petent to have been entered by him ’ against it,
 “ departed from. And lastly, that a certain sum of
 “ money should be paid by the defender, part of it
 “ instantly to Lieutenant Maule himself, and the re-
 “ mainder by instalments at particular periods to
 “ Lieutenant Maule, or the substitutes who might, in
 “ the event of his death, happen to be in his right under
 “ the entails at those periods.

“ This transaction stood unchallenged till the year
 “ 1810, when the pursuer having discovered that the
 “ transaction, though apparently a submission and
 “ decree arbitral, was substantially an agreement be-
 “ tween the defender and his father Lieutenant Maule,
 “ raised an action for setting aside that submission and
 “ decree arbitral, and the service which he had obtained
 “ under it while he was in ignorance of the true nature
 “ of the transaction. That summons called merely for
 “ production of those documents in order that they
 “ might be reduced; and upon that reduction founded
 “ the conclusion, that the defender should remove from
 “ the houses and parks of Brechin and Panmure,
 “ being the subjects contained in the entailed leases.
 “ It contained no conclusion whatever concerning the
 “ estates of Kelly and Ballumbie, and the 9,000*l.*
 “ bond. And it is easy to see, from the nature of
 “ the discussion which afterwards took place, why
 “ it was so limited. It was evidently founded on
 “ the assumption, that by the reduction of the

“ decree arbitral the decree of the Court of the 5th
 “ March 1782 revived as a *res judicata*; and accord-
 “ ingly, the summons founded the demand of removing
 “ exclusively on the reduction. In the discussion under
 “ that summons, various points of great difficulty and
 “ importance were raised, which it is unnecessary here
 “ to mention. But with regard to the assumption
 “ forming the foundation of the summons, two questions
 “ arose; 1st, whether, on the decree arbitral being set
 “ aside, the defender was entitled to be heard on the
 “ merits of his claim to the leases, notwithstanding the
 “ decree of Court 1782? 2dly, whether he was en-
 “ titled to be so heard without bringing a reduction of
 “ that decree? And it is important to observe, that this
 “ second question, though apparently one of form, was
 “ substantially decisive of the pursuer’s demand of the
 “ houses and parks of Brechin and Panmure, under the
 “ only summons then in Court; for it involved the
 “ inquiry, whether the decree of 1782 in regard to the
 “ leases was a standing decree, available to the pursuer
 “ until reduced; and the decision of that point against
 “ him necessarily led to the result that in the summons
 “ then in Court, founding merely on the reduction of
 “ the decree arbitral, and assuming by implication that
 “ on that reduction the decree of Court revived, he had
 “ laid no ground whatever for his conclusion for removing.

“ Now, it appears to me, that this last was the only
 “ point which was truly settled by the final judgment of
 “ the House of Lords, in this action, in the year 1819.
 “ In the first appeal, in 1816, the House of Lords had
 “ found, ‘ that the submission and decree arbitral ought
 “ ‘ not to be considered as being or having in law the
 “ ‘ effect of such, but as a form adopted, in which an

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- No. 40. “ ‘ agreement previously made between Thomas Maule,
 27th August “ ‘ the appellant’s father, and George Earl of Dalhousie,
 1833. “ ‘ parties to the said submission, was concluded,’ and
 MAULE “ with that finding remitted the case to the Court of
 v. “ Session. The Court, on 2d December 1817, sus-
 MAULE. “ tained the defences in general, and assolized the
 “ defender. There was then a second appeal by the
 “ pursuer, in the discussion of which the respondent,
 “ the defender, was materially interested in excluding
 “ the effect of the decree 1782 as to the leases, as a
 “ judgment necessarily reviving in favour of the pursuer,
 “ and requiring a reduction to impeach it. And it is of
 “ importance to look at the grounds on which that was
 “ maintained,—grounds which, considered alongst with
 “ the judgment afterwards pronounced by the House of
 “ Lords, are quite irreconcilable with the notion that
 “ the pursuer was properly and directly a party to the
 “ proceedings in 1782. The respondent, in his appeal
 “ case on that occasion (page 10), states, that ‘ in 1781
 “ ‘ Lieutenant Maule, the appellant’s father, laid claim
 “ ‘ to the leases in question in virtue of the entails now
 “ ‘ founded on by the appellant. Lieutenant Maule him-
 “ ‘ self was the only pursuer in that process, the present
 “ ‘ appellant being no party in it.’ Again, after men-
 “ tioning that Lieutenant Maule obtained one interlocu-
 “ tor in his favour on the 5th March 1782, and afterwards
 “ closed the proceedings by the transaction of 2d April,
 “ he proceeds, (page 11.) ‘ but the interlocutor was not
 “ ‘ final and it never did become final, as a judgment in
 “ ‘ favour of the appellant, or even of Lieutenant Maule.
 “ ‘ Lieutenant Maule, who had alone obtained it, re-
 “ ‘ nounced the benefit of it within the reclaiming days,
 “ ‘ and it was set aside and given up by a very solemn

“ ‘ transaction.’ And again, ‘ but the finding never
 “ ‘ was a judgment in favour of this appellant ; it was
 “ ‘ an interlocutor in favour of Lieutenant Maule, and
 “ ‘ not of the appellant ; and surely a judgment not final,
 “ ‘ and solemnly discharged by the party for a valuable
 “ ‘ consideration, can never afterwards be raised up as
 “ ‘ a res judicata.’

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“ This view, it will be observed, was indispensable to
 “ support the respondent’s case on that occasion ; for
 “ if the pursuer had been properly and distinctly a party
 “ in the combined actions in which the judgment re-
 “ specting the leases was pronounced, the agreement of
 “ Lieutenant Maule to renounce the decree would have
 “ left it still a good decree available to the pursuer,
 “ who, according to the preceding judgment of the
 “ House of Lords, was not affected by the submission.
 “ On the other hand, if Lieutenant Maule was the only
 “ proper party, the reduction of the agreement by the
 “ pursuer could not rear up the decree ; because, on
 “ that supposition, it was a decree passed from by the
 “ only party in the suit. It appears to me that this
 “ last was the view taken by the House of Lords. They
 “ reversed the interlocutor of the Court, ‘ in so far as
 “ ‘ it is inconsistent with the former order of the House
 “ ‘ of the 10th of May 1816.’ They farther order and
 “ adjudge, ‘ that the instrument of the 2d of April
 “ ‘ 1782 ought to be reduced as a decree arbitral
 “ ‘ affecting any rights of the appellant.’ Next, it is
 “ declared, ‘ that under the circumstances of this case,
 “ ‘ the interlocutor of 1st March 1782 is not to be con-
 “ ‘ sidered as final and conclusive against the respondent
 “ ‘ with respect to the leases in question ; and therefore,
 “ ‘ as to so much of the appellant’s action of reduction

No. 40. “ ‘ and declarator as seeks a declaration of the rights of
 27th August “ ‘ the appellant to such leases, it is further ordered
 1833. “ ‘ and adjudged, that the said interlocutor of 2d De-
 MAULE “ ‘ cember 1817 be and the same is hereby affirmed,
 v. “ ‘ but without prejudice as to any question between the
 MAULE “ ‘ parties in any other action touching any property
 “ ‘ comprised in the deeds of tailie in the pleadings
 “ ‘ mentioned.’ Here the part of the judgment reject-
 “ ‘ ing the pursuer’s claim to the leases, erroneously
 “ ‘ termed a declarator of right instead of a removing, is
 “ ‘ preceded by the word ‘ therefore,’ and is thus made
 “ ‘ to depend on the previous finding, that the interlocu-
 “ ‘ tor of 1st March 1782 was not to be considered
 “ ‘ conclusive against the respondent with respect to the
 “ ‘ leases ;—a deduction which appears to me to be strictly
 “ ‘ correct, because, upon the supposition of the decree
 “ ‘ 1782 not being a decree conclusive against the de-
 “ ‘ fender, there was truly no ground for the conclusion
 “ ‘ of removing laid in the then existing summons, which
 “ ‘ rested that conclusion on nothing but the reduction
 “ ‘ of the decree arbitral. Accordingly, the judgment
 “ ‘ contained an express reservation ‘ of any questions
 “ ‘ between the parties in any other action touching
 “ ‘ the rights contained in the various entails.’

“ After this the pursuer raised his action in 1821, in
 “ which he, for the first time, advanced his claims, not
 “ only to the leases, but to the estates of Kelly and
 “ Ballumbie, and the 9,000*l.* bond; and, considering
 “ the view hitherto taken by him, this delay is not to be
 “ wondered at. His claim hitherto advanced was
 “ limited to the leases, because it was bottomed on the
 “ assumption that, by the reduction of the decree
 “ arbitral, the decree 1782 was restored to operation ; a

“ supposition which, of course, prevented him from
 “ claiming the estates to which his father’s claim had
 “ been rejected by that very decree. Finding, then;
 “ that the decree 1782 was to be held open to challenge
 “ at the instance of the pursuer, he assumed that it was
 “ equally open to challenge in so far as it was adverse
 “ to himself; and adopting a particular, and as it has
 “ turned out, erroneous, construction of the judgment
 “ of the House of Lords, he assumed not only that it
 “ was substantially open to challenge, but that it was
 “ open to challenge by way of exception, and without
 “ the necessity of any procedure for impeaching it. So
 “ far he has been found in the wrong by the final judg-
 “ ment of the House of Lords in 1826, which found
 “ that the judgment of the Court of Session, of the 5th
 “ of March 1782, was *res judicata* in respect to the
 “ estates and bond, inasmuch as it appears to their
 “ Lordships ‘ that it was not competent to the appellant,
 “ ‘ by the summons of reduction and declarator in the
 “ ‘ said interlocutors mentioned, to impeach such decree
 “ ‘ of the 5th of March 1782, so far as the same re-
 “ ‘ spected such estates and bond, and such decreet has
 “ ‘ not been impeached by reclaiming petition or appeal;
 “ ‘ or any other proceeding competent to impeach the
 “ ‘ same.’ I cannot hold, that in this judgment the
 “ term *res judicata* was used as denoting a judgment
 “ which it was incompetent in any way to impeach.
 “ Independently of the expressions employed by the
 “ noble Lord who moved the judgment, the judgment
 “ itself seems to be sufficiently explicit. The decreet
 “ is held *res judicata*, inasmuch as it was not competent
 “ to impeach it by the summons of reduction then in
 “ dependence, and such decreet had not been impeached

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“ in any other competent form ; the evident meaning of
“ the House of Lords being, that the judgment must be
“ held as *res judicata* under that summons, calling
“ merely for the reduction of the defender's titles, and
“ unless impeached by some substantive procedure com-
“ petent for that purpose, but without determining
“ whether some other procedure for that purpose might
“ or might not be competently adopted. And I may be
“ permitted to observe, that this judgment does not appear
“ to me to involve any inconsistency with that of 1819, on
“ the effect of the decree 1782 in relation to the leases.
“ Holding Lieutenant Maule to be the only party in
“ the conjoined actions of 1782, the transaction, though
“ reduced as to the pursuer, truly remained effectually
“ binding on Lieutenant Maule, and consequently an
“ effectual waiver in favour of the defender of the de-
“ creet 1782. In so far as the decree was favourable to
“ Lieutenant Maule, it was, on the supposition just
“ made, passed from by the only party at whose instance
“ it was obtained. But, on the other hand, the decree,
“ in so far as it was against Lieutenant Maule, remained
“ in force. Instead of being passed from by the party
“ who had obtained it, the right to challenge it had
“ been passed from by the party against whom it had
“ been obtained. The decree in this last particular,
“ therefore, remained a decree of Court in favour of
“ the present defender, which the House of Lords seem
“ to have held good until it was effectually challenged.

“ In the present action, then, the pursuer has at-
“ tempted that challenge. In the summons he concludes
“ for the reduction of the decree 1782, as touching the
“ lands and the 9,000*l.* bond, as well as of the various
“ titles of the lands founded on by the defender.

“ Considering the limitation contained in the inter-
 “ locutor of Court of the 31st January 1827, I am of
 “ opinion, that by far the greater part of the discussion
 “ in the pursuer’s pleadings are beyond the limits con-
 “ templated in that interlocutor. In one sense, no
 “ doubt, it may be said that the reduction of a decree
 “ involves the merits of that decree, as those merits
 “ truly constitute the interest of the party seeking to
 “ reduce it. But the interlocutor of the Court, by
 “ limiting the production to the decree itself, and sisting
 “ process as to the writings, ‘ until reduction of the said
 “ ‘ decree,’ seems to me to have intended to confine
 “ the discussion to the point, whether the decree itself
 “ formed a title to exclude? In other words, whether
 “ or not, under all the circumstances of the case, the
 “ pursuer was entitled competently to impeach the
 “ decree, so as to reach the merits of the case, of which
 “ the discussion was necessarily postponed by sisting
 “ the process in regard to the writings involving those
 “ merits.

“ Considering this to be the only point on which I
 “ am called upon to give, and have the means of giving,
 “ an opinion, that opinion is, that the pursuer is entitled
 “ to reduce the decree 1782 in regard to the lands of
 “ Kelly and Ballumbie and the 9,000*l.* bond, to the
 “ effect of being heard on his claims to those subjects.

“ In forming this opinion, I do not consider it neces-
 “ sary to inquire into the effect of the expiry of the
 “ quadriennium utile, or of those circumstances by which
 “ that effect may be supposed to have been suspended
 “ or excluded. There might have been room for some
 “ such inquiry if the decree 1782 had been directly and
 “ expressly against the pursuer, called *nominatim*, and

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“ appearing in the combined actions. But it does not
 “ appear to me that he either was properly called or did
 “ appear; the whole of the actions were actions de-
 “ pending with Lieutenant Maule, his father. Even in
 “ the one action in which Lieutenant Maule was called
 “ as administrator for his children, the summons is blank
 “ in regard to the children, and no appearance was ever
 “ made by Lieutenant Maule except in his individual
 “ character. Accordingly, in the discussion under the
 “ original summons raised by the pursuer in 1810, the
 “ defender, as has been seen, pleaded, and pleaded with
 “ effect, that the proceedings in 1782 were proceedings
 “ to which the pursuer was not a party, and the judg-
 “ ments pronounced in which, Lieutenant Maule, as the
 “ only party, had a right to abandon.

“ In these circumstances it is impossible to hold the
 “ decree 1782 as a decree directly and nominatim
 “ against the pursuer. Its operations as a *res judicata*
 “ must rest upon a different ground, namely, that though
 “ not a decree directly against him, it was a decree
 “ effectual against him and the other heirs of entail, in-
 “ asmuch as it was a decree respecting the validity of
 “ entailed rights pronounced in actions maintained by
 “ Lieutenant Maule, the party fully vested at the time
 “ with those rights. That a decree so pronounced will,
 “ in the general case, be held an unchallengeable *res*
 “ *judicata*, there seems no reason to doubt; but I think
 “ that this special case does not admit of the application
 “ of that principle.

“ In this first place, I conceive it to be completely
 “ excluded by the option which has been already exer-
 “ cised on the part of the defender in construing the
 “ effect of the proceedings in 1782, in so far as they

“ terminated in favour of the heirs of entail. Had the
 “ defender, in the discussion on the reduction of the
 “ decree arbitral and action of removing, confined him-
 “ self to the defence of the decree arbitral, and had
 “ judgment gone against him in the removing, as
 “ necessarily following from the decree 1782, in regard
 “ to the leases reviving on the reduction of the decree
 “ arbitral, it would have been perfectly consistent to
 “ plead now that, in virtue of that self-same decree
 “ 1782, his right to the lands and bond were finally
 “ ascertained. But he did not adopt the option of
 “ standing by the decree 1782 that was held out to him
 “ by the defender. On the contrary, he maintained, as
 “ he was no doubt entitled to do, that on the reduction
 “ of the decree arbitral the decree in regard to the
 “ leases was not only not conclusive, but was not an
 “ available decree at all requiring to be reduced, inas-
 “ much as it had been abandoned by Lieutenant Maule,
 “ the only party who had obtained it.

“ Now, though the decree, in so far as it was against
 “ Lieutenant Maule, has been found to stand in a dif-
 “ ferent situation in this particular, that it requires to
 “ be directly impeached by some substantive procedure,
 “ it does appear to me necessarily to follow from the
 “ construction put upon the procedure in those combined
 “ actions by the defender himself, that the pursuer must
 “ be entitled to impeach the decree, so as to be heard
 “ upon the merits of the case. The only ground upon
 “ which that could be denied is, that the decree was ob-
 “ tained in an action regarding entailed rights against
 “ Lieutenant Maule, the heir in whom those rights
 “ vested at the time. But that ground is necessarily
 “ excluded by the course of pleading adopted, and suc-

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- No. 40. “ cessfully adopted, by the defender, who obtained a re-
 27th August “ hearing in the case of the leases, in respect that the
 1833. “ decree on that point was truly a decree in favour of
 MAULE “ Lieutenant Maule, and not in favour of the heirs of
 MAULE “ entail, and had been passed from by the party who
 “ had obtained it. In other words, the defender main-
 “ tained, and successfully maintained, in regard to the
 “ leases, that the decree was obtained by Lieutenant
 “ Maule in his individual character, and not in that of
 “ representative of those interested in the entailed rights.
 “ But it seems to be impossible for a party to plead,
 “ that the same decree pronounced in conjoined actions
 “ can receive a directly different construction in regard
 “ to its mode of operation ; and to maintain, that in so
 “ far as it was in favour of Lieutenant Maule it was a
 “ decree in his favour as an individual, of which the
 “ heirs of entail could take no benefit ; but that, in so
 “ far as it was against him, it affected him in his repre-
 “ sentative character, and consequently, through him,
 “ the whole other heirs of entail. These pleas are
 “ absolutely inconsistent ; and, therefore, the opening
 “ up of the decree in regard to the estates and bond
 “ seems to me the necessary consequence of the option
 “ exercised by the defender in refusing to stand by the
 “ decree on the subject of the leases ; and I cannot help
 “ thinking, that this was the meaning of the expression
 “ employed by the Noble Lord who moved the judgment
 “ in 1819, ‘ that the opening the interlocutor of 1782,
 “ ‘ considering it as not res judicata, must be consi-
 “ ‘ dered as opening it altogether.’ Although, therefore,
 “ it has been found that the decree in question obtained
 “ against Lieutenant Maule, and in favour of the de-
 “ fender, is res judicata available to the defender until

“ impeached, I think that the pursuer is entitled to im-
 “ peach it, and that the present reduction is competent
 “ for that purpose.

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“ But, secondly, and independently of the ground
 “ above mentioned, I am rather inclined to think that
 “ the pursuer, an heir of entail, would not have been
 “ bound by the legal procedure in question, closed as it
 “ was by a transaction with Lieutenant Maule, which
 “ has been finally determined not to be effectual against
 “ the pursuer. It is true that a judgment obtained re-
 “ specting entailed rights against the party vested with
 “ them at the time is good against the other heirs of
 “ entail; but this, of course, involves the assumption
 “ that the question has been bonâ fide litigated by the
 “ heir in possession, according to a sound discretion, and
 “ upon a fair exercise of those privileges to which, by
 “ the rules of litigation, he is entitled. There seems,
 “ therefore, no reason to doubt, that if the litigant, in
 “ the exercise of that sound discretion, declines, upon
 “ judgment being pronounced against him, to bring the
 “ case under review by a reclaiming petition or by ap-
 “ peal, the judgment of a Lord Ordinary is not impaired
 “ in effect by the failure to bring it under review of the
 “ Court, still less is the judgment of the Court invalidated
 “ by the circumstance of the unsuccessful party de-
 “ clining to appeal. But it is a very different case
 “ indeed, when the heir of entail in possession, litigating
 “ in his representative as well as individual character,
 “ does, during the dependence of his right to reclaim,
 “ or of his right to appeal, make those rights the subject
 “ of a transaction with the opposite party, and surrender
 “ them for a consideration personal to himself. I should
 “ consider it alike dangerous in practice, and contrary

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“ to principle, to hold that a judgment of which the
 “ review was bought off by the opposite party stood, in
 “ a question with the heirs of entail, in the same situa-
 “ tion as a judgment allowed to become final in the fair
 “ exercise of a sound discretion, contemplating the legal
 “ probabilities of continuing the litigation. There is a
 “ manifest distinction between the two cases; and I
 “ rather think that in the former case the heirs of en-
 “ tail would, upon showing that they were not bound
 “ by the transaction, be entitled to impeach the decree,
 “ which had not been bonâ fide acquiesced in by the
 “ original litigant, but of which the right of review,
 “ recognized as a subject of value, had been surrendered
 “ for considerations in which they had no interest. But
 “ this seems to be the case which exists here. At the
 “ time when the compromise was entered into, Lieu-
 “ tenant Maule had a right to reclaim, and certainly
 “ had a right to appeal; and accordingly the abandon-
 “ ment of the cross appeal is expressly set forth in the
 “ submission and decree arbitral as one of the considera-
 “ tions of the transaction.

“ I am of opinion, then, upon both of these grounds,
 “ that the pursuer is entitled to be let into the merits of
 “ the case. I have only farther to add, that they appear
 “ to me to be proper grounds of reduction; and that
 “ the competency of the present procedure, therefore,
 “ cannot be affected by the lapse of the period allowed
 “ for appeal. In truth, upon the principle adopted in
 “ the House of Lords in the judgment 1819, the sur-
 “ render of the right to appeal by Lieutenant Maule,
 “ the only party in the suit, would have been an effectual
 “ bar to any other party attempting that mode of review.
 “ The true grounds of challenge here are, that the

“ judgment 1782, though obtained against a party who
 “ happened to be vested with the entailed rights at the
 “ time, was obtained or allowed to become final under
 “ circumstances which exposed it to challenge, in so far
 “ as it might be construed to affect the other heirs of
 “ entail; grounds which appear to me to form the apt
 “ and competent subject of an action of reduction like
 “ the present.”

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On these opinions being laid before their Lordships of the First Division, they gave opinions to the following effect:—

Lord Balgray.—“ In this very important question,
 “ and after giving it the most anxious consideration,
 “ and attending particularly to the opinions which have
 “ been given in by the consulted Judges, I have come
 “ to form a very clear opinion. I had not for some
 “ time made up my mind whether there was a res
 “ judicata or not; but after paying all the attention in
 “ my power to the various proceedings and judgments,
 “ the opinion I have now clearly formed is in perfect
 “ accordance with the opinion so well expressed by Lord
 “ Corehouse, and adopted by some of the other Judges.
 “ I also concur in part with the opinion expressed by
 “ Lord Fullerton.

“ I cannot look at the proceedings in the House of
 “ Lords, the judgment in the House of Lords, and,
 “ above all, the fatal proceeding on the part of the de-
 “ fender—I say I cannot look upon these, and bring
 “ my mind to any other conclusion than that there
 “ must be a complete restitutio in integrum. I think
 “ it was so understood in the House of Lords, and I
 “ cannot interpret their judgment in any other way. I
 “ look upon it as a debitum justiciæ to this pursuer;

No.40. " and therefore, on the whole, without enlarging on
 27th August " what has been so well expressed by Lord Corehouse;
 1833. " I have only to say I concur entirely in the opinion of
 MAULE " his Lordship, and the other Judges who concur in that
 v. " opinion."
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Lord Craigie.—" I concur entirely in the same
 " opinion. If the one party was to receive any thing
 " from that judgment, in common justice I think that
 " the other party is also entitled to the benefit of it. I
 " cannot conceive a case where the Court, on the whole
 " circumstances, can hesitate that the pursuer is entitled
 " to be restored in integrum."

Lord President.—" I confess the case strikes me in a
 " very different point of view. I cannot conceive that
 " the question is now open for us. If you will attend
 " to the judgment of the House of Lords, it ends with
 " these words, after affirming the interlocutor of this
 " Court in regard to the leases: ' But without prejudice
 " ' to any question between the parties in any other
 " ' action touching any property comprised in the deed
 " ' of taillie in the pleadings mentioned.'

" Then comes the important judgment of the 26th of
 " May 1826, the terms of which it is very particular to
 " attend to. It is in these words: ' It is ordered and
 " ' adjudged, that the interlocutors complained of be
 " ' affirmed with respect to the estates of Kelly and
 " ' Ballumbie and the bond for 9,000*l.* in the said in-
 " ' terlocutors mentioned, so far as the said interlocutors
 " ' find that all right and interest in the said estates
 " ' and bond, which the appellant claimed under the
 " ' summons of reduction and declarator in the said
 " ' interlocutors mentioned, are totally excluded, and
 " ' the subject matter of the action then before the Court

“ ‘ as to such estate and bond was res judicata by the
 “ ‘ judgment of the Court of Session of 5th March
 “ ‘ 1782, in the said interlocutors mentioned; inas-
 “ ‘ much as it appears to their Lordships that it was
 “ ‘ not competent to the appellant, by the summons of
 “ ‘ reduction and declarator in the said interlocutors
 “ ‘ mentioned, to impeach such decret of the 5th of
 “ ‘ March 1782, so far as the same respected such estates
 “ ‘ and bond, and such decret has not been impeached
 “ ‘ by reclaiming petition or appeal, or any other pro-
 “ ‘ ceeding competent to impeach the same: And it is
 “ ‘ further ordered and adjudged, that the interlocutors
 “ ‘ complained of be and the same are hereby reversed,
 “ ‘ so far as the same find that all right and interest
 “ ‘ which the appellant claims of the leases of Brechin
 “ ‘ and Panmure, under the summons of reduction and
 “ ‘ declarator in the said interlocutors mentioned, were
 “ ‘ totally excluded, and that the subject matter of the
 “ ‘ action then in question touching such leases was
 “ ‘ res judicata by all the several judgments referred to
 “ ‘ in the interlocutors complained of.’ Now, if it was
 “ the meaning of the House of Lords to find, notwith-
 “ standing these separate findings as to the leases
 “ and the estate, that every question was still open
 “ between the parties, it appears to be the most extra-
 “ ordinary judgment ever pronounced by the House of
 “ Lords. They find expressly, with regard to the
 “ estates, that there was a res judicata, and they affirm
 “ the interlocutors of this Court on that point. But,
 “ says the pursuer, they only meant to find that it was
 “ a res judicata in so far as it was competent to the ap-
 “ pellant in that particular action. But in that view
 “ the judgment should have said nothing about res

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- No. 40. “ judicata at all. If the forms of the House had
 27th August “ admitted it, it should have been before answer. More-
 1893. “ over, they should have put in an express reservation ;
 MAULE “ but so far from that, they say that the said decree has
 v. “ not been impeached. So that, although the party did
 MAULE. “ not appeal within the five years, although that time
 “ was allowed to expire, and no appeal is brought and no
 “ reclaiming petition even presented to us, that still within
 “ forty years he is entitled to open up that judgment.
 “ I cannot conceive what the judgment of the House
 “ of Lords was, if it was not a res judicata. A res
 “ judicata means a thing that cannot be touched at all.
 “ If it is a res judicata, then it is final to all purposes,
 “ and cannot be touched at all. I cannot conceive what
 “ could have been the meaning of the House of Lords
 “ in positively finding that they affirmed the interlocutor
 “ of this Court in so far as we found that the decree in
 “ 1782 was a res judicata, unless they meant that it
 “ really was a res judicata. I cannot imagine, after that,
 “ that it could be the meaning of the House of Lords
 “ that there was no res judicata. If such was the
 “ meaning of the House of Lords, let them find so. I
 “ concur entirely in the opinion expressed by the Lord
 “ Justice Clerk.”

Lord Gillies.—“ This is a question certainly of very
 “ considerable difficulty, upon which there is a great
 “ difference of opinion among the Judges. I concur
 “ in the opinion of the Lord Justice Clerk; and I go
 “ very much along with the observations which have
 “ been made by your Lordship. It does seem to me
 “ to be a very odd thing, that although there is a judg-
 “ ment of the House of Lords expressly affirming a
 “ judgment of your Lordships, finding that it was a

“ res judicata, still that is to be held as no res judicata;
 “ and may therefore be competently challenged. This
 “ does seem odd to me. What he was required to do
 “ in the submission was, that he should not enter an
 “ appeal. What he might have done, no mortal can
 “ say. He had not entered an appeal, and we can not
 “ say whether he would have done so or not. I cannot
 “ reconcile myself to the idea, that because a man is
 “ restrained from entering an appeal within five years,
 “ that therefore he should be entitled to reduce the
 “ judgment within forty. I entirely concur in the
 “ opinion of the Lord Justice Clerk; it would only be
 “ wasting your Lordships’ time, were I to go over the
 “ same grounds again.”

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Lord President.—“ The judgment must be according
 “ to the opinion of the majority: there are eight of the
 “ Judges for finding there is no res judicata.”

The Court accordingly, on 5th July 1831, pronounced
 this judgment: — “ The Lords having resumed con-
 “ sideration of this cause, and advised the same, with the
 “ opinions of the consulted Judges, and heard the
 “ counsel for the parties, repel the defences of res judi-
 “ cata, and decern; and remit to the Lord Ordinary to
 “ ordain the defender to satisfy the production in
 “ common form: And the Lords, at the request of the
 “ parties, reserve entire the question of expenses; and
 “ of consent remit to the Lord Ordinary to call the
 “ cause without an hour.”

On a petition by the appellant, leave was granted to
 him to appeal from the above judgment, and he accord-
 ingly entered an appeal.

The arguments of the parties were to the same effect

No. 40. as the reasons assigned by the Judges for the opposite
27th August views taken of the question, and need not be resumed.
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LORD CHANCELLOR.—My Lords, if in the last case which your Lordships have just disposed of there has been no inconsiderable length of time occupied in litigation, and large sums of money expended, that case sinks into insignificance, compared with the one to which I am now about to draw your Lordships attention. In this there is a remarkable circumstance, a circumstance one may hope, if not unexampled in the history of our jurisprudence, at least of very rare occurrence, namely, that upwards of half a century since a decree was pronounced between the parties, or those whom the parties now represent (the predecessors of the parties), which decree was then intended to be final; nevertheless, instead of its proving so, it has only been the point from which a new departure has been taken; the source from which an apparently interminable and most complicated litigation, or rather series of law suits, has arisen. I firmly hope, however, indeed I am confident, that we are at length approaching to the period of those suits. My Lords, where the Court below is found as nearly divided as fourteen Judges can be, short of equality,—where there are, of either opinion, Judges of the greatest ability, learning, and experience,—and where the greater number being in favour of the judgment, yet the two Chiefs of the Court are found against it,—a very natural anxiety may be supposed to have restrained me from proceeding to advise your Lordships until the fullest opportunity had been afforded of considering the question in all its bearings. Nevertheless the case lies within

a narrow compass, and I have arrived at the conclusion, which I now state without hesitation, that the interlocutor complained of cannot stand.

The decree of March 1782 must be taken to be a subsisting decree, making the subject matter of this present suit *res judicata*. "It has not been impeached at the competent time, either by reclaiming petition or appeal," (I use the language of one of your Lordships judgments,) "or any other proceeding competent to impeach the same." To which I shall take leave to add, in the words of the learned Lord President, on advising this question, that "if the House of Lords did not thereby mean to treat it as *res judicata*, it is difficult to understand what they meant." Let us shortly consider the course of the proceedings, and the grounds upon which it is contended that the decree of 1782 has not the effect of making the matter *res judicata*. We shall presume, that as long as the decreet arbitral stood in his way, the respondent, and those to whom he succeeded (that is, his father,) could not take any steps for questioning the judgment of 1782. Then observe when that impediment was removed. In 1809 the reduction was brought, and a narrow majority having assoilzied the defender, (that is, supported the decreet arbitral,) your Lordships, upon appeal, took a different view of the submission and decreet, holding, by your judgment of 10th May 1816, that these instruments were "not to be considered as having in law the effect of a submission or decreet arbitral, but only as a form of agreement between the parties." It is material to observe, that this finding of your Lordships not only seems in itself incapable of any other construction than setting aside the decreet arbitral, but it was so treated by the respondent

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No. 40. himself; his own statement in the printed case now
 27th August before the House is, that "he then (on the remit to the
 1833. "Court of Session) correctly contended, that the de-
 MAULE "creet arbitral was set aside in toto." An observation
 v. "might here arise upon the state of the respondent's case
 MAULE. after the judgment. Had he not now sufficient ground
 for prosecuting his appeal against the decree of 1782, or
 bringing it under review of the Court by reclaiming
 petition? Supposing the reclaiming days not to have
 expired in 1782 before the submission, the decreet ar-
 bitral was, according to his own construction, no longer
 in his way,—it had been set aside by your Lordships :
 and although his adversary (the present appellant) no
 doubt maintained the contrary, putting another con-
 struction upon your Lordships judgment, yet that might
 have been submitted to the Court in the course of any
 proceeding taken by the respondent ; for the question
 of the subsistence of the decreet arbitral might then have
 been raised. However, the case does not rest here ; for
 after the remit, and the interlocutors pronounced below
 in consequence, the case came back to this House, and
 in 1819 a judgment was pronounced. The interlocu-
 tor of 1817 coincided in the respondent's view of your
 Lordships judgment, and proceeded upon the fact of the
 decreet arbitral not being in the respondent's way, at
 least as regards the leases ; yet he did nothing then to
 challenge the judgment of 1782. Next, in 1819, came
 your Lordships judgment, in terms finding that the in-
 strument purporting to be a decreet arbitral ought to be
 reduced and set aside as a decreet arbitral affecting any
 rights of the appellant. This was the 10th July 1819,
 and from this date, at the very latest, it is plain that the
 respondent ceased to have any ground whatever for not

challenging the decree of 1782, all obstacles being at any rate now removed ; but he took no such proceeding.

It is fit that we now attend to the judgment of your Lordships in 1819. After setting aside the decret arbitral, it adds a declaration, “ that under the circumstances of this case the interlocutor of 1782 is not to be considered as final with respect to the leases,” and therefore affirms as to those leases ; “ but without prejudice to any question between the parties in any other action touching any property comprised in the deed of taillie.” As far as this saving clause goes, it rather indicates a leaning against the interlocutor of 1782 being open, excepting in respect of the leases. For if you say a judgment is not final as to one matter, but without prejudice to any question as to another matter, it should seem that you guard yourself against the inference from what you have found respecting the one to what you may be supposed to mean respecting the other, —as if you said, “ Mind, when we say the interlocutor is open as to the leases, it does not follow that we mean to say it is also open as to the estates.” But in 1820, when the case went back with this finding of your Lordships, the decret arbitral was formally reduced, and, as it were, ceased to exist. Did the respondent then proceed ? Not to set aside the interlocutor of 1782 on its merits ;—he neither tried to reduce it, nor did he appeal from it, nor reclaim against it ; but he sued upon the entails, and proceeded against titles alleged to be inconsistent with them, and which your Lordships had sustained. The defence of *res judicata* was taken, and prevailed ; the Court below, by its interlocutors of 5th June 1823, and 1st June 1824, finding that, by the decrees of 1782, 1813, 1816, 1817, 1819, and 1820, the subject matter of the action was

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No. 40. *res judicata.* This finding was submitted to your Lordships by appeal, and the judgment of 26th May 1826 was then pronounced, on which so much reliance has been placed, both in the Court below and in the argument at your Lordships bar. I have very attentively considered this judgment, and I can put but one construction upon it. The decision is, to affirm the interlocutors with respect to the estates and bond, so far as declaring all rights therein claimed by the appellant to be totally excluded, and the subject matter of the action as to such estates and bond to be *res judicata* by the decret of 1782; but to reverse, in so far as the interlocutor found the question touching the leases to be also *res judicata*. I can only read this as a declaration, that the decret of 1782 was a subsisting judgment quoad the estates, and shut out all question respecting them, though not quoad the leases. But it is followed by a reason which the respondent would represent as a qualification of the finding, and a statement that he may still set the decret aside, “inasmuch” (says the judgment) “as it was not competent to the appellant, by his summons of reduction and declarator, to impeach the decret of 1782, so far as respected the estates and bond, and such decret had not been impeached by reclaiming petition or appeal, or any other proceeding competent to impeach the same.” It is contended that this judgment only means that the party could not succeed against the decret of 1782 in that form of action, but that he might have impeached it in another, and might still impeach it in another, viz. by reduction. This appears to be a forced and unreasonable construction, if it goes beyond the legal form, that he might still reduce it on the head of forgery or collusion. The judgment clearly means, that the decret of 1782 stood in the party’s way as to

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the estates, though not as to the leases, in respect of the finding to that effect (that is to say, quoad the leases) in the judgment of 1819. It states that the decret never had been reclaimed against or appealed from, nor in any other way impeached. This can only mean that it had not been appealed from according to the rule which regulates the right of appeal, and directs the manner of appealing, nor reclaimed against in the way appointed for reclaiming; and that therefore it stood unshaken, and presented an obstruction not to be got over. The general expression, "nor any other proceeding competent to impeach the same," refers, no doubt, to reduction, the only other mode of attacking a decret; but reduction, of course, to be prosecuted according to the rules appointed for that proceeding. It is quite impossible to deduce from this part of the judgment any admission, that if the respondent chose he might set aside the decret. The very same expressions might have been used if a judgment had stood for one hundred years unquestioned without any such special circumstances as are to be found in this case. The Court might have declared that the party was concluded, by that judgment standing unappealed from and unimpeached in any other way. Would it follow from thence that the Court invited the party to try an appeal or a reclaiming petition, by an implied admission that if he did, his hundred years laches should be no bar, and the lapse and the possession of a century be of no safety to his adversary?

The manner in which the judgment under consideration, that of May 1826, refers to the leases, and to the finding of the judgment of 1819 upon them, greatly aids the construction I have put upon this judgment of your

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Lordships. There is, indeed, in one part of it, an expression which at first sight may seem to favour the contrary view,—and on this the consulted Judges, who support the interlocutor under review, have observed; but upon looking more narrowly at it, we find that it only contains a recital of the words used in the judgment of 1819, and from hence alone wears the appearance of treating the question as open. “The intent and meaning,” it goes on, “of the whole of such judgment being, to “leave all questions respecting the leases, as well as “the rest of the property in the deeds of taillie, open “to be discussed in such manner as the same might “properly be discussed in any future proceeding properly instituted for that purpose.” But this, in truth, proves nothing. If the judgment of 1819 leaves the whole question open to be discussed properly by one party, it leaves the plea of *res judicata*, among other proper defences, open to the other. But it seems quite impossible to get over the very different way in which the judgment of 1826 deals with the leases and the other property, and the different manner in which it applies to the one and the other the findings of the judgment of 1819; whereas the respondent must contend, that the two kinds of property stand upon the same footing in respect of the decret of 1782, and that the plea of *res judicata* is altogether and alike applicable to both. I have adverted more than once to the different position in which the question stands as to the leases, and as to the estates, and I have referred generally to the two parts of the subject matter, resting on grounds sufficiently distinct to warrant your Lordships in having held the plea of *res judicata* good as to the one, while as to the other you declared the question open,—“under the cir-

“ cumstances of the case,” to use the words of the judgment. It is the less necessary to dwell longer upon this distinction, because the particulars of it are stated with much precision, and in a satisfactory manner, in the opinion of the consulted Judges who do not concur in the interlocutor appealed from. With their Lordships observations, contained in the 9th and 10th paragraphs of page 16 of the appellant’s appendix, my mind goes along, for the most part, if not entirely; certainly with all that is material to the statement of the diversity, and the exposition of what it rests on.

The points attempted to be made, of decree in absence, and reduction ex capite minoritatis, need not be considered at all. They are wholly untenable; and, indeed, respecting them, I perceive no difference of opinion amongst the Learned Judges: all agree in rejecting them. I have also purposely abstained from saying any thing upon the remarks delivered by the two Noble and Learned Lords who advised your Lordships, when the case was before you in 1819 and 1826; because, admitting the account we have of what fell from them to be accurate, it is not fit to construe any judgment by reference to the arguments used in recommending or expounding it. But great respect is undoubtedly due to the opinions of those learned persons, upon any points to which they addressed their minds, and therefore, it would be very proper to avail ourselves of such lights as their remarks might shed on any doubtful parts of the present question, if the force of the judgment pronounced by your Lordships, and which cannot be at all affected either way by their arguments, left us at liberty to consider the points raised as still undecided. In Lord Gifford’s argument,

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No. 40. I can see nothing which materially aids the respondent
 27th August in his present contention, while there is much that
 1833. makes against him. It is true that his Lordship says,
 MAULE “ The House has not now to decide whether the appel-
 v. “ lant (respondent) can by any manner get rid of the
 MAULE. “ judgment,” on the decret of 1782 ; and from hence
 it is argued, that his Lordship meant to represent the
 question as still open upon the merits of that decret;
 and in one sense, no doubt he did ; for who could deny
 that a reduction might be brought against it, on the
 grounds of forgery, collusion, vitiation in substantialibus ?
 Does it follow that his Lordship considered the decret
 as subject still to be set aside by reclaiming petitions to the
 Court of Session, or by appeal to your Lordships House ?
 But the short observations of Lord Eldon in 1819 are
 more relied upon, or rather, an expression is picked out
 from those observations, and made the ground of infer-
 ences, towards which I do not think his Lordship ever
 pointed. “ The opening of the interlocutor of 1782,”
 he says, “ considering it as not *res judicata*, must be
 “ considered as opening it altogether.” Both here and
 in Lord Gifford’s argument, it may be remarked, there
 is some inaccuracy, probably in the report ; for their
 Lordships are made to speak of the decret of 1782 as
 being a *res judicata*. The matter, the subject of the
 decret, is *res judicata*, because of the decret ; but the
 decret itself can in no correctness of speech be so
 called. Passing that, however, and only regarding it
 as a proof that the report cannot be very correct, it is
 not fair towards any Judge to catch at a single expres-
 sion, without reference to the context, and to the matter
 upon which he is delivering his opinion. Lord Eldon

was here referring to the leases, though he does not name them; but the judgment which he was moving to have altered, clearly shows that he alluded to the leases; and it would be straining his expressions beyond all bounds, and also, I may say, imputing to his Lordship a course of proceeding which he was, more than any Judge I ever knew, averse to—that of giving an opinion, wholly uncalled for, as to the question being open upon every part of the case, when it was only necessary for his purpose to state that it was open as to the leases.

Upon the whole, I am of opinion that the judgment below cannot stand; and in coming to this opinion, I feel much satisfaction from two considerations: 1st, the great opprobrium will no longer rest upon the administration of the law,—that after the lapse of half a century from a decree in the suit, every thing should still be open between the parties, and a new course of litigation be in reality only beginning; 2dly, that when I look into what can be descried of the respondent's case, behind the bar now raised, and alone now under review, there seems little reason to expect, that, if that bar were removed, and the respondent suffered to question the original judgment upon its merits, he could alter the decision. While, therefore, your Lordships may entertain the reflection, that no substantial case is shut out by your resolution, you have the farther satisfaction of feeling that the claimant, were he allowed to proceed, would, in all probability, end where he now is, after much additional expense, and long protracted delay to himself as well as his adversary. My Lords, in this case, I have said nothing about costs,—of course there can be no costs in the case of a reversal. I have

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No. 40. a very strong opinion of what it might be fitting for the
27th August noble appellant to do in this case, and I have privately
1833. intimated to those professionally concerned for him my
MAULE opinion respecting the costs of this appeal.
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The House of Lords ordered and adjudged, That the interlocutor complained of in the said appeal be and the same is hereby reversed : And it is declared, That the defence of *res judicata* ought to have been sustained : And it is further ordered, That the cause be remitted back to the Lords of the said First Division of the Court of Session to proceed therein in such manner as shall be consistent with this judgment : And it is further declared, That this House does not think fit to make any order respecting the costs of this appeal, and that the question of expenses of process in the said Court of Session is left entire for the discretion of that Court.

MONCREIFF, WEBSTER, and THOMSON—RICHARDSON
and CONNELL, Solicitors.

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VOLUME VI.

ACQUIESCENCE. See *Sale*, 1.

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AGENT AND CLIENT.

1. Circumstances in which an agent who was employed by the lender of a sum of money, to be secured over an heritable subject, and also by the borrowers, to prepare the necessary deeds, but without any special instructions as to the form of the security, having constituted a real security, but neglected to insert a personal obligation on the borrowers or a power of sale in favour of the lender, it was held (affirming the judgment of the Court of Session) that he was liable for the loss sustained by the lender from the want of these clauses. *Clark v. Sim*, July 1, 1833, p. 452.
2. A law agent was employed by a creditor to lead an adjudication against the entailed estate of his debtor; and the agent raised a summons concluding for decree of adjudication of the debtor's life rent interest in the lands, which he obtained, and employed another agent to complete a feudal title on the decree by charter and sasine, which was done accordingly; but it was afterwards found that they were inept as a feudal title, in respect the fee and not the life-rent ought to have been adjudged:—Held (affirming the judgment of the Court of Session) that the original agent was liable in repetition to the creditor of the expense of the charter and sasine, but not in damages; and that the other agent was not liable in repetition or damages. *Graham v. Alison and others*, July 19, 1833, p. 518.

See *Partnership*, 2.—*Process*, 1.

APPEAL.

1. Held incompetent to have an appeal, previously disposed of, reheard, on the ground that an interlocutor in the cause had been omitted to be appealed from, and had not been allowed to be considered at the previous hearing. *Scot v. Ker and another*, August 11, 1832, p. 214.

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APPEAL (Continued).

2. Opinion intimated, that, where the pleadings in the Court below entitle a party to insist on an objection, the House of Lords are not barred from deciding the appeal upon that objection, though it may not have been pressed in the Court below, and though it form no part of the consideration of that Court in pronouncing the interlocutor appealed from. *Luke v. Magistrates of Edinburgh*, August 15, 1832, p. 241.

ARRESTMENT IN MEDITATIONE FUGÆ.

A married woman was brought from England to Scotland on a criminal warrant, and tried for the crimes of housebreaking and robbery, of which she was acquitted:—Held (1.) that she was liable to be immediately arrested on a meditatione fugæ warrant at the instance of the parties whose property had been stolen; (2.) that it was competent to obtain a second warrant, after the first had been dismissed as irregular in form; (3.) that it is sufficient ground for granting a warrant to apprehend as in meditatione fugæ, if the creditor depone to the verity of the debt, and his belief that the debtor meditates flight. *Crowder v. Watsons*, August 16, 1832, p. 271.

BANKRUPTCY.

1. The Court of Session having held that a party who had been for a short while a trader, but had totally wound up business, and, as he alleged, paid all the debts and obligations incurred while a trader, was liable to be sequestrated at the instance of a creditor, whose debt was a private debt, incurred many years before the debtor had commenced trade, but which had continued unpaid during and after his trading; on appeal, the House of Lords directed the following question to be put to the Twelve Judges: "A., not a trader, becomes indebted to B. to the amount of "100*l*. A. afterwards becomes a trader, and ceases to be a trader, never having paid his debt to B. After ceasing to be a trader, he commits an act of bankruptcy. Can B. support a commission against him upon his debt and that act of bankruptcy?" The judges declared their unanimous opinion in the affirmative. *Baillie v. Grant*, June 25, 1832, p. 40.
2. Can a sequestration issue at the instance of some of the partners of a bank against one of their partners, on a debt due by him individually to the company? *Scot v. Ker* and another, August 11, 1832, p. 214.
3. Held (affirming the judgment of the Court of Session) that a party who had been charged with letters of horning, and who retired to Holyrood-house before caption could be executed against him, but who was apprehended in the sanctuary, and there and then pleaded his protection, was a notour bankrupt, within the meaning of the statute. *Baillie v. Grant*, June 25, 1832, p. 40.
4. Held (affirming the judgment of the Court of Session) that a disposition and assignation, and infestment taken thereon within sixty days of the bankruptcy of the granter, in implement of

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- missives of sale executed several months previously, were not reducible under the act 1696. *Cranstoun and others v. Bontine and another*, July 6, 1832, p. 79.
5. Circumstances under which (reversing the judgment of the Court of Session) a bankrupt whose estate was under sequestration was held not bound to find caution for expenses of process as a condition of being allowed to defend himself against a declarator of irritancy of a lease. *Taylor v. Fairlie's Trustees*, March 1, 1833, p. 301.
 6. A party who held a lease and feus became bankrupt, and the trustee on his sequestrated estate entered into possession of the lease, and was infest in the feus; and for several years took the benefit of the lease and feu-rights for the use of the sequestrated estate:—Held (affirming the decision of the Court of Session) that he was bound to fulfil the prestations due under these contracts towards the landlord. *Gibson v. Kirkland and Sharpe*, March 25, 1833, p. 340.

BILL OF EXCHANGE.

1. Held (affirming the judgment of the Court of Session) that a party sued for payment of acceptances found in his deceased agent's repositories is not entitled to enter into an accounting on vague allegations of intrusions by the agent, the creditor in the bills, it being admitted that the defender had received great advances from the agent, and the correspondence proving that, after the date of the bills sued on, the agent complained to the defender that no exertions had been made towards repayment. *Earl of Strathmore v. Ewing*, June 19, 1832, p. 56.
2. Found (reversing the judgment of the Court of Session) that it is incompetent for a married woman to make herself liable upon bills of exchange. *Earl of Strathmore v. Ewing*, June 19, 1832, p. 56.

See *Payment*.

BURGH. See *Church*.

CAUTION. See *Bankruptcy*, 5.—*Insurance*.

CHURCH.

Held (affirming the decree of the Court of Session) that the town council of Edinburgh, as patrons, were entitled to appoint an assistant and a successor to a minister who was disabled by age from performing the duties of the office, the minister giving his consent to the appointment. *Luke v. Magistrates of Edinburgh*, August 15, 1832, p. 241.

CLAUSE.

- (1.) Construction of an agreement under which the appellant was bound, not merely to account for, but to pay 2,000*l.*; and interim decree granted for the same affirmed. (2.) Incompetent to control the agreement by extrinsic evidence. *Baillie v. Baillie and others*, July 12, 1833, p. 498.

See *Partnership*.—*Testament*, 1. 2. 5.

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COMPETENT AND OMITTED. See *Process*, 1.

CONDITION. See *Implied Condition*.—*Testament*, 5.

CONDITIONAL INSTITUTE. See *Testament*, 3.

DISCUSSION. See *Warrandice*.

ENTAIL.

An heiress of entail under a canal statute obtained 120*l.* per acre for land used for the canal, and a further sum for her consent to a new line deviating from a former one, and which approached nearer to the mansion house than the original one:—Held (affirming the judgment of the Court below) that she was bound to re-invest the sum obtained for such consent, for behoof of the heirs of entail. *Maitland Gibson v. Maitland and others*, June 18, 1833, p. 388.

See *Agent and Client*, 2.—*Res Judicata*.—*Warrandice*.

ERROR. See *Obligation*.

EXPENSES.

1. The Court of Session having, in an advocacy, found the advocate entitled to the expenses of the whole suit, including those incurred in the original action as well as in the advocacy, the House of Lords altered, and found the appellant (the original defender) entitled to all the expenses in the advocacy, up to the date of and including the Lord Ordinary's judgment; but that the appellant and respondent ought respectively to bear their own expenses in the advocacy in the Inner House, and of the appeal. *Robertson v. Harford and others*, March 6, 1832, p. 1.

2. Expenses awarded against a defender in a process of proving the tenor. *Rintoul v. Boyter*, June 27, 1833, p. 394.

3. Circumstances in which, while the decision of the Court below affirmed on the merits, it was in part reversed as to expenses. *Hunter v. Duff and others*, August 11, 1832, p. 206.

See *Bankruptcy*, 5.—*Process*, 1.—*Testament*, 1.

FISHING. See *Salmon Fishing*.

HUSBAND AND WIFE.

Circumstances under which held that a married woman was entitled to sue for damages on account of slander without the concurrence of her husband. *Ewing v. Cullen*, August 24, 1833, p. 566.

See *Bill of Exchange*, 2.

IMPLIED CONDITION.

Circumstances which were held (affirming the judgment of the Court of Session) not sufficient to exclude a grand-daughter claiming under the condition "si sine liberis," from the provision contained in her grandfather's settlement in favour of his children. *Booths v. Black*, August 11, 1832, p. 175.

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INSURANCE.

A life insurance company lent a sum on condition that the debtor should insure his life with their office to the amount of the debt, and assign to them the policy of insurance; and they took the debtor and his cautioner bound to pay the principal and interest and premiums of insurance. After the debtor's death, they charged the cautioner to pay the sum lent, on the allegation that the policy had been allowed to fall by nonpayment of the premiums; and the cautioner alleged that the manager of the company had accepted from the debtor a bill for the premiums, and agreed to renew the policy. The Court of Session suspended the charge, but the House of Lords remitted, with directions to investigate the facts. *North British Insurance Company v. Barker*, March 5, 1833, p. 323.

INTEREST. See *Master and Servant*.

JUDICIAL FACTOR. See *Partnership*, 1.

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LOAN. See *Insurance*.

MASTER AND SERVANT.

A hedger and ditcher in the employment of a Scottish nobleman on his estates in England entered into a written agreement to serve him in that capacity on his estates in Scotland, at the same wages as those who were formerly employed in the same capacity on these estates had received; and the nobleman farther stated, "In addition to these, as an encouragement for his "greater assiduity, Lord M. is to make him a present of 20*l*;" and the party so hired served for several years:—Held (affirming the judgment of the Court of Session) that under all the circumstances the addition of 20*l*. was not limited to the first year of service.—Bank interest allowed on the arrears of the 20*l*. for nineteen years. *Earl of Mansfield v. Scott*, Feb. 18, 1833, p. 277.

MEDITATIO FUGÆ. See *Arrestment*.

MINOR. See *Testament*, 5.

OBLIGATION.

Circumstances in which it was held (affirming the judgment of the Court below) that an obligation to pay a debt was not founded on such error as was sufficient to set it aside. *Grieve v. Wilson*, August 19, 1833, p. 543.

PACTUM ILLICITUM. See *Partnership*, 2.

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PARENT AND CHILD. See *Testament*, 5.

PARTNERSHIP.

1. The partners of a company having died, one intestate, and the last survivor having left a settlement, appointing trustees and executors, and the trustees and executors having accepted:—Held (affirming the judgment of the Court of Session) that the representatives of the intestate partner were entitled to have the property sequestrated, and a judicial factor appointed. *Dixon and another v. Dixon and others*, August 13, 1832, p. 229.
2. A secret agreement was entered into between a law agent in the country and a person who was about to practise before the Supreme Court, by which the former, in consideration of his advancing money for the business, stipulated that he should receive one third of the profits:—Held (affirming the judgment of the Court of Session) that such an agreement was *pactum illicitum*. *Gilfillan v. Henderson*, July 12, 1833, p. 489.
3. By the contract of copartnery entered into on the formation of a shipping company, it is provided that “the free profits” of the company, as they shall appear at the time of each annual balance, shall be divided among the partners in proportion to their several shares in the concern, under a provision that in fixing the amount, 25 per cent. of the free profits as appearing at the balance, shall be set apart as a sinking fund for upholding the number of vessels necessary for carrying on the company’s trade and meeting risks, with this qualification, that if the said sinking fund shall at any time exceed 5,000*l.* no part of the profits thereafter shall be set aside so long as it remains at that amount. The directors on striking the annual balance, previously to setting apart the sinking fund and ascertaining the net profits, made a deduction from the gross receipts, and brought it to the credit of the different vessels, on account of their deterioration within the past year. One of the parties having challenged this mode of reaching the amount of the free profits, the House of Lords affirmed the judgment of the Court of Session, assailing the defenders. *Flowerdew v. The Dundee Shipping Company*, August 11, 1832, p. 160.

PAYMENT.

Circumstances in which it was held, affirming the judgment of the Court of Session, that the interest on a bond was paid; that one bill was prescribed, and another retired; and that the trustees of a party, alleged, but not proved to have purchased pictures, was entitled to return them to the seller. But the interlocutor of the Court below was altered in part as to costs. *Hunter v. Duff and others*, August 11, 1832, p. 206.

PRESCRIPTION, SEXENNIAL. See *Payment*.

PROCESS.

1. A party who had allowed the agent of his opponent to obtain decree in the Jury Court for expenses in his own name, found barred, (affirming the judgment of the Court of

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Session.) by the exception of competent and omitted, from suspending a charge, on the allegation that the agent had no attorney licence for the period when the expenses were incurred. And held that the case of *Robertson v. Strachan*, June 9, 1826, 4 Shaw and Dun., p. 772, is ill decided. *Ewing v. Wallace*, August 13, 1832, p. 222.

2. Although a party found on a fact in his summons, yet if he do not do so in his condescendence he cannot afterwards avail himself of it. *Luke v. Magistrates of Edinburgh*, August 15, 1832, p. 241.

See *Appeal*.—*Bankruptcy*, 5.

PROOF.

In a reduction of a deed of settlement instituted by a party who had been served heir to the granter, he adduced a witness, who deposed that he considered himself a nearer heir than the pursuer; that he had intimated to the defender his intention to challenge the deed, and although he did not obey a charge which he got to enter heir, he reserved his right to do so; that he believed he had not been served; that his mother was third cousin of the granter, and he was grandson of the daughter of the granter's ancestor, whose marriage he had not yet been able clearly to prove, although he had not yet made all the exertion in his power to do so; that he had nothing to do with the present case, but that, although he had not made up his mind to do it, he might challenge the deed, if he proved his propinquity; that he certainly did not withdraw his claim as heir at law, and had not renounced it in favour of the pursuer:—Held (reversing the judgment of the Court of Session) that he was a competent witness. *Ralston v. Rowat*, July 10, 1833, p. 468.

See *Clause*.

PROVING THE TENOR.

Circumstances in which a decree of the Court of Session, holding the tenor of a destroyed deed proved, was affirmed. *Rintoul v. Boyter*, June 27, 1833, p. 394.

PROPERTY.

Circumstances under which a portrait of a late rector of the High School of Edinburgh, taken at the request and expense of an association of his pupils, and placed in the school-room, was, after his death, and on the removal of the school to a new building, held to be the property of the association, and not of his son and representative. *Clerk and others v. Adam*, July 16, 1832, p. 141.

See *Salmon Fishing*.—*Servitude*, 2.

PROVISIONS TO WIVES AND CHILDREN. See *Testament*, 5.

REPARATION.

Certain judicial statements alleged to be slanderous, held (reversing the judgment of the Court of Session) to be privileged, unless it

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was proved that the party using them did so from motives of malice, and did not believe them to be true; and a remit made to ascertain these facts by the verdict of a jury. *Ewing v. Cul-*

len, August 24, 1833, p. 566.

See *Agent and Client*, 1, 2.—*Sale*, 2.

RES JUDICATA.

Circumstances in which (reversing the judgment of the Court of Session) a decree pronounced in 1782, in a question with an heir of entail, was held *res judicata* as to part of the subject matter thereof, in a question with a subsequent heir of entail. *Maule v. Maule*, August 27, 1833, p. 586.

SALE.

1. In defence to an action by a seller, raised in the Burgh Court of Glasgow, for payment of a balance of an account for iron purchased from him, the purchaser pleaded, 1st, that the iron was not sent within the time ordered; 2dly, that it was deficient in weight; 3dly, that it was of different sizes from those specified in the order. The seller maintained that he had fulfilled the terms of the bargain, and that the purchaser was at any rate barred by his silence and acquiescence. The Burgh Court sustained the defences; but the Court of Session, on advocacy by the pursuer, adhered to the Lord Ordinary's judgment, altering and decerning in terms of the libel, and found the advocator entitled to expenses in the inferior court and in the Court of Session. The House of Lords reversed the judgment of the Court of Session, and found the defender properly assoltized by the Burgh Court, and remitted to the Court of Session to proceed as might be necessary to give effect to this judgment. *Robertson v. Harford and others*, March 6, 1832, p. 1.

2. Circumstances under which a purchaser of land, who had accepted a disposition, paid the price, and entered into possession, held (affirming the judgment of the Court of Session) not entitled to damage, on account of being disappointed in one of his alleged views for buying the lands, in consequence of the terms of a missive of lease held by the tenant of the land, and the existence of which missive the purchaser averred had not been disclosed to him. *Reddie v. Syme*, August 11, 1832, p. 188.

See *Payment*.

SALMON-FISHING.

A party, alleging an exclusive right of fishing salmon and all other fish in a river, to the banks of which he had no right, but to the waters of which, as well as to the fishings, he claimed an absolute and exclusive right, raised actions of declarator, suspension, and interdict against the proprietor of lands adjacent to and bounded by the river, and infest on titles, conveying the lands 'cum pertinentibus,' and supposed also 'cum piscationibus,' who claimed a right to fish for trout and other fish ex adverso his lands. The House of Lords affirmed the judgment of the Court of Session,

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holding that the latter proprietor did not require to prove prescriptive exercise of such right of fishing; but that, independent of such prescriptive possession, he had a right to fish trouts in the river *ex adverso* his property, with trout rods, but not with net and coble, or in any way prejudicial to the former party's salmon-fishing. *Mackenzie v. Rose*, May 14, 1832, p. 31.

SEQUESTRATION. See *Bankruptcy*.

SEQUESTRATION OF LAND ESTATE. See *Bankruptcy*.

SERVITUDE.

1. In an action by the proprietor of houses and gardens in the town of Hamilton, to declare his right, generally, to take sand and gravel from the banks of the river Clyde, the property of another party, found (reversing the judgments of the Court of Session) that, under his summons, he was not entitled to found upon the possession of persons, proprietors and occupiers of houses and gardens in the town of Hamilton similarly situated with his houses and gardens, but had a title only to insist as one of the inhabitants of the town, or as owner of certain lands therein, to the effect of having his right of servitude, in right of and for the use of his own properties, tried by a jury.—Circumstances under which the claimant to a right of servitude held to be not bound, in order to support his action, to plead a right of commonity in the subject to which the alleged servitude attached. *Duke of Hamilton and Brandon v. Aikman*, July 5, 1832, p. 64.
2. The Court of Session having found that the proprietor of a house, who had access to it through a contiguous area, disposed with its buildings and houses to another person, under an obligation to make an arched close for a cart entry to the area, with modified restrictions as to erecting buildings, and with the declaration that the area in question "shall be mean property for the preservation of light," had a right to load and unload carts in the area, the House of Lords reversed, and remitted with a declaration. *Baird v. Ross*, July 16, 1832, p. 127.

See *Thirlage*.

SI SINE LIBERIS, &c. See *Implied Condition*.

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TENOR. See *Proving the Tenor.—Expenses, 2.*

TESTAMENT.

1. Circumstances in which an obscurely worded deed of settlement was interpreted (affirming the judgment of the Court below) to mean, 1. that the division of the property was bipartite, or per stirpes, amongst the families of two nephews; and, 2. that trustees were bound to denude in favour of the minor children of the elder nephew when the eldest child of the younger nephew had attained twenty-one years of age.—Both parties found entitled to their expenses out of the property bequeathed. *Bryden and others v. Bryden and others*, April 22, 1833, p. 354.
2. Circumstances in which it was held (affirming the judgment of the Court of Session) that a testator's intention was to subject certain trust funds and estate to the payment of his debts, and to free certain property in England from that liability; and effect given to the testator's intentions. *Elliott's Trustees v. Earl of Minto*, June 1, 1833, p. 381.
3. A testator by his deed of settlement conveyed his whole property to his daughter, under the burden of paying 2,500*l.* to each of his two grandchildren at majority; and in case of the death of either of them without children, the survivor to succeed to the share of the predeceaser; and in the event of the death of both without children, the testator's daughter "to succeed to the whole of what is herein provided to them." The daughter granted an heritable bond to the grandchildren for their provisions, with the same destination as in the settlement; one of them died in minority, unmarried and intestate, but the other survived majority, and called up the money in the bond, but died unmarried and intestate, before receiving payment:—Found (affirming the judgment of the Court of Session) that the representatives of the grandchild who survived majority (and not the testator's daughter) were entitled to succeed to the provisions; and that the heritable bond being merely a corroborative security made no change on the rights of the parties under the settlement. Question, whether the destination was a substitution or a conditional institution? *Greig and others v. Johnstone and others*, July 1, 1833, p. 406.
4. A grandmother directed her trustees to pay the residue of her estate to her grandson at Martinmas after his majority, and failing his surviving that term, or, if he did survive it, failing his specially disposing the same, to accumulate the residue for behoof of the children of the testatrix's daughter; the grandson survived majority several years, and obtained payment directly from the debtor of the testatrix of a sum due to her, which he commingled with his other funds, and he died unmarried and intestate:—Held, that this sum belonged to the representatives of the grandson, and not to the children of the daughter of the testatrix. *Greig and others v. Johnston and others*, July 1, 1833, p. 406.
5. A father bequeathed a provision to his daughter in life-rent, and her children in fee, declaring that the provision should be in full of all that his daughter could claim from his estate:—Held

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(affirming the judgment of the Court of Session) that the right of the children to the fee was not affected by the daughter repudiating the provision, and betaking herself to her legal claims. *Dixons v. Fisher and others*, July 1, 1833, p. 431.

6. Question, (1.) As to the construction and effect of a clause in a deed of settlement, as to a party being bound to deduct a certain sum in the event of succeeding to a bond, from a provision in the deed of settlement? and, (2.) Whether a minor was sufficiently bound so as to prevent her resiling from an agreement by her legal guardians? *Adamson and others v. Darling and others*, July 16, 1833, p. 501.

7. Held (affirming the judgment of the Court of Session) that where a party had by a trust deed settled certain lands on one person, and left legacies to others, and provided for the sale of other lands for payment of the debts, legacies, &c., and to entail any residue that might be left, the legacies were not excluded by insufficiency of the fund provided for their payment, but were payable out of the trust estate generally. *Hamilton v. Bennet*, August 16, 1833, p. 533.
See *Implied Condition*.

THIRLAGE.

Circumstances under which, in the absence of any written title, a claim to thirlage, founded on prescriptive possession, was (affirming the judgment of the Court of Session) sustained. Circumstances under which the lightest thirlage, consistent with the facts of the case, was (reversing the judgment of the Court of Session) held to be constituted. *Duke of Argyll v. Macalister*, July 12, 1832, p. 98.

TRUST.

Circumstances under which an assignation of a lease *ex facie* absolute was held (affirming the judgment of the Court of Session) to have been granted in security only, and to be redeemable by the heir of the assignor, on repaying to the assignee the advances made by him in relation to the lease. *Reid v. Lyon*, July 16, 1832, p. 114.

See *Bankruptcy*, 6.—*Testament*, 2, 7.

WARRANTICE.

A titular and patron, possessing under an unrecorded entail, sold teinds, and bound himself and his heirs and successors to warrant them from all future augmentations:—Held (affirming the judgment of the Court of Session) that the purchaser's successor was entitled, without discussing the heirs of line of the seller, to go against the heir of entail for relief of all augmentations subsequent to the sale. *Duke of Roxburghe v. Kerr*, August 7, 1833, p. 526.

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APPENDIX
TO VOLUME VI.
OF
WILSON AND SHAW'S REPORTS
OF
APPEALS TO THE HOUSE OF LORDS.

INDEPENDENT OF THE GREAT AND PERMANENT IMPORTANCE
OF THE FOLLOWING SPEECHES, THEIR APPLICATION TO THE
CASE OF THE ANNANDALE PEERAGE, NOW BEFORE THE HOUSE
OF LORDS, HAS INDUCED THE REPORTERS TO PRINT THEM AS
AN APPENDIX TO THE PRESENT VOLUME.

Lincoln's Inn,
24th July 1834.

SPEECHES

OF

THE RIGHT HONOURABLE JOHN LORD ELDON,
LORD HIGH CHANCELLOR.

*Delivered in the House of Lords on the 15th, 16th, and 19th June 1809,
in the Roxburghe Causes*.*

FIRST DAY, *Thursday, 15th June 1809.*

MY LORDS,—Before I proceed to state to your Lordships my humble sentiments upon the points, or several of the points, which have been discussed in the questions which have been long in agitation before your Lordships, with respect to the estates and honours of the late Duke of Roxburghe, you will allow me first, in a few words, to explain the reasons which induce me to adopt the course which, your Lordships will perceive in the sequel of what I have to state to you, appears to me, under all the present circumstances of the case, the most advisable.

My Lords, after your Lordships had heard at the Bar a great deal of most able argument, upon various questions relative to the landed property, I mean, in the first place, the question, Who were to be considered as heirs of tailzie under the deed which, your Lordships will recollect, was executed in 1648? upon the question, How far that deed, by its prohibitory, irritant, and resolute clauses, had forbidden an alteration of the course of succession? upon the question, What is the effect of a certain clause to be found in that deed, which described the eldest daughter of Hary Lord Ker and their heirs-male? upon the important question, What is the meaning and import of those words “their heirs-male,” as the words occur in that clause of the deed of 1648? upon the questions which arise, with reference to the effect of subsequent instruments, executed from time to time down to 1747,

* Sir James Norcliffe Innes, Brigadier-General Walter Ker, and Bellenden Ker, 23d June 1807. (Mor. Dec. N. 13, App. voce Tailzie.)

and the effect of length of time operating as prescription ; and a great variety of other important questions, which it is not necessary now to detail to you ; it occurred to me, that some of the same questions which were to be decided with reference to the title to the landed estates, must also be decided by your Lordships, first in a Committee of Privileges, and afterwards by the House, upon a report from the Committee of Privileges ; and that it was at least advisable, therefore, that such a number of your Lordships as are necessary to constitute a Committee of Privileges, which, your Lordships know, is a larger number than is necessary to constitute a House sitting either in judicial or legislative business, should proceed to some extent : That, with a view to avoid the danger of coming to different decisions, where those decisions appear to be on the construction of the same instruments, in the House and in the Committee, though decisions applied to different subjects, to dignities in the one case and to landed property in the other, it was at least advisable your Lordships should go to a considerable extent, in the Committee of Privileges, in your enquiries with respect to the dignities ; and, my Lords, I certainly had a very strong persuasion, that if, without that delay, which operates mischievously and injuriously, your Lordships could, in the first instance, decide altogether the questions as to the dignities before you came to a determination upon the questions as far as they respected the landed estates, that would be a most desirable course for you to take. Upon reflection, however, it does appear to me, that if your Lordships shall suspend your judgments upon the points in litigation with reference to the landed estates, until you shall be able to come, consistently with your own rules of proceeding, to a decision upon the dignities claimed, it must be attended, of necessity, with a tedious procrastination of this business, and with a delay before you come to judgment, which I am afraid would operate too severely upon the parties. I cannot, therefore, permit myself further to recommend to your Lordships that course of proceeding.

Your Lordships will recollect that the dignities claimed are, that of the Dukedom of Roxburghe,—the Earldom of Roxburghe and the Barony of Roxburghe,—the Marquisate of Beaumont and Cessfurd,—the Earldom of Kelso,—the Viscountcy of Broxmouth,—and the Lordship of Ker of Cessfurd and Caverton. I need

not put your Lordships in mind, because I am sure it will be in your recollection, that the deed of 1648 applies only to the Earldom of Roxburghe; that the patent of Queen Anne, by which she granted to the then Earl of Roxburghe the Dukedom of Roxburghe, does not, if I collect its effect rightly, confer any other dignity. It limits the Dukedom of Roxburghe to the Duke and his heirs of tailzie entitled to the Earldom of Roxburghe; but in the course of so much argument as we have had at the Bar with respect to these titles, we know nothing more of the creation of the Lord Roxburghe, who was created early in the century before the last, except that there was such a creation. We have not had laid before us what was the origin of the titles of Lord Roxburghe, and Lord Ker of Cessford and Caverton; and before we can come to a decision upon the claims to those dignities, the history of all those dignities must be circumstantially and accurately before us.

My Lords, It will be necessary also, if we are obliged to content ourselves with as little of information respecting many of these dignities as we have hitherto had, to come to a decision upon the question, what it is that the law, with respect to dignities, authorises us to presume to have been the contents of instruments not produced; what limitations we are by presumption, legal presumption, to suppose to have been contained in those instruments which are not produced. I need not tell your Lordships too, that I believe this would be the very first case which ever occurred in judicature in this House, I mean judicature with respect to titles and dignities, in which your Lordships have ever come to abstract decisions; what was the effect of instruments appearing, or passages contained in instruments producible, and what was the effect of the law with reference to presumptions upon the probable contents of instruments that cannot be produced before you. Your Lordships have had at your Bar persons who have proved themselves, by establishing their pedigree and propinquity, to be individuals who had a right to call upon you for some decision upon such subjects. It would be a new proceeding in this House, with respect to titles and dignities, that we should be deciding upon the rights of parties, who, for aught we know at this moment, may not have been at your Lordships Bar; coming to decisions, therefore, which might eventually not benefit those who

have been at your Lordships Bar, and which unquestionably could not operate against those who had not been there.

My Lords, By the course, however, which your Lordships adopted, in referring it to the Committee to take into their consideration, whether the titles and dignities under the charter of 1646 and the charter or deed of 1648 were conveyed to that series of heirs who are called to succeed to that property, by that clause of the deed in 1648, beginning with the words, "and qlkis all " failzieing be decease, or be not observing of the provisions, " restrictions, and conditions above written;" and by another direction which your Lordships House gave to the Committee, to take into their consideration what was the effect, with reference to the dignities, of the words " heirs-male," contained in the deed of 1648, you have secured to yourselves the benefit of a further and repeated discussion of those points before a more numerous audience than that which constituted the House when the same points were under consideration with reference to the landed estates. If, therefore, there is a danger of our miscarrying in judgment, when it is now proposed to your Lordships to take under your earlier consideration how you should determine the questions with respect to the landed estates, the House has at least secured to itself this benefit, that there has been given a repeated opportunity, and to a more numerous body of your Lordships, the opportunity of considering those very questions; and if any of your Lordships who attend the Committee of Privileges thought it fit to object, by reason of what they had heard in the Committee, to any determinations which shall be proposed, and which, directly affecting the lands, may also consequently affect the honours, it is open to any of you so to object. Besides that, there has been another advantage gained by the mode of proceeding, and that is, that your Lordships have had under your consideration how far it can be said that the honours are affected by this deed of 1648; a consideration which was represented at the Bar to be material, as undoubtedly it is in some degree, and in an important degree, to enable you to decide what is the effect of many of the words, the meaning of which has been in controversy, which occur in the deed of 1648, with regard to the landed property, as it will be in your Lordships recollection that it was contended, that an

opinion upon the question whether the honours passed by that deed might enable you the better to conclude what was the right judgment as to the construction of the words that occurred in that deed of 1648 with respect to the landed property.

My Lords, To this extent, it appears to me, the course your Lordships have taken has been useful; but I own I cannot myself approve our proceeding in that line of conduct further: but your Lordships must determine whether you think it right to pursue that line of conduct throughout, and to the end; and the consequence of that, it is too manifest, must be this, that your Lordships cannot give to these litigant parties at the Bar any opinion in judgment upon the title to the lands, till that time shall have elapsed, which it appears to me is no very short period, till you can have had before you all those proofs which would justify you, according to the usages of this House, to come to a determination upon the titles to all those dignities, and upon all the questions of law that affect each of them; and all the questions of fact that affect the claims of those who are contending before your Lordships, and calling upon your Lordships to give his Majesty your advice in their favour with respect to those dignities.

In this state of things, it has occurred to me, that your Lordships would pardon me, if I presume now to ask your permission to give my own opinion, at least upon the points which have been under consideration in the question relative to the estates: and whatever your Lordships may think proper to do after that opinion is delivered, I shall at least retire from this House with the satisfaction of recollecting, that, as far as any industry on my part,—any attention on my part,—any diligent investigation of this subject on my part can be of use to the parties, or to your Lordships, I shall not have run the risk of withdrawing from your Lordships, or those parties, the humble assistance that I may be able to offer, or have run the risk, perhaps, of not having another opportunity to offer that assistance. In the course of last summer, I do assure your Lordships, that this matter lay very painfully upon my mind. It has affected that mind very painfully ever since: it still does so; and I hope your Lordships will excuse me, if I take the present opportunity of relieving myself, by declaring my opinion, as far as I can, upon the subject: and for the purpose of doing this, I must recall to your Lordships attention, with as

much of accuracy as I am able, the facts of this case, as the case relates to the landed property.

My Lords, I am as little a friend, upon principle, as any body can be, to the notion of construing the meaning of one deed by ascertaining what is the meaning of another, more especially if the purpose of the latter deed be to alter the effect of the former; but still it is necessary to state to your Lordships the history of the titles, for two reasons: First, Because I do apprehend it is perfectly competent to every court of Justice, when it is construing an instrument, to look at other instruments with a view to determine what is the language and style, and what is the phrase of the law, or of those who are conversant with the law; but, more particularly, I am desirous to state the history of the title to your Lordships, because I am extremely anxious that the parties should themselves be satisfied that we have not overlooked any of those facts, or circumstances, which they have thought sufficiently material, and sufficiently important, to be made the topics of reasoning and argument at your Lordship's Bar.

My Lords, as Colonel Walter Ker states the history, and, for the purpose for which I am now addressing myself to your Lordships, I will take it to be correct; he says, that in the beginning of the fifteenth century, a person of the name of Andrew Ker of Altonburn was the head of a distinguished family of that name on the southern border of Scotland; that he had three sons, Andrew, James, and Thomas; that from these respectively descended the families of Ker of Cessfurd, of Lynton, and of Gateshaw. He states, that in 1467, Andrew, the eldest son, obtained from the Crown a grant of the lands of Cessfurd; that those were limited to the heirs-male of the institute, and all the substitutes, and the heirs-male of their bodies respectively, and upon default of them, to the nearest true and lawful heirs whatsoever of Andrew Ker. My Lords, in 1474, he represents that this Andrew Ker resigned the lands of Cessfurd, and obtained a charter from the Crown, granting them to Walter Ker, the son and heir-apparent of Andrew Ker of Cessfurd, and his heirs-male lawfully begotten and to be begotten; in failure of them to Thomas Ker, and his heirs-male; in failure of them, to William Ker, and his heirs-male; in failure of them, to Ralph Ker, and his heirs-male; and in failure of all of them, to the nearest lawful heirs whatsoever of the said Andrew Ker.

My Lords, He states a great variety of other charters, particularly, I think, a charter in the year 1542, another charter in 1553, and another in 1573, all of which, it may be represented to your Lordships, as it has been represented from the Bar, keep alive the right to the estate in a male-succession, confining the right to a male succession; and it is indisputable, that according to this claim, which, for the present I presume to be made good, when Robert, who was the first Lord Roxburghe, created by his patent Lord Roxburghe, which patent does not appear, and who was afterwards created Earl Roxburghe, that, when that Earl Roxburghe was seised of the estates, he had them vested in him descendible to a male line, and to a male line only.

My Lords, I am anxious to state this circumstance distinctly to your Lordships, and I have stated it repeatedly, for the purpose of stating it distinctly; because it will be within your Lordships recollection that it has been contended, that it might at least be probable, that as this estate had come in the male line, according to the history of it, from the year 1467, down to the year 1648, that the first Earl of Roxburghe did not mean to disturb that species, and that line of succession, beyond that degree, and beyond that extent, in which he has, in the most express terms, disturbed it; and I, therefore, stop here one moment to say, that previous to the year 1643, previous of course to 1644, when there was one charter or deed, as your Lordships recollect, executed, and to 1648, this Earl had these estates descendible to the male line of heirs, heirs-male of the body, and heirs-male in general.

My Lords, The then Earl of Roxburghe was not prohibited, by any of those clauses which, in Scotch entails, have that effect, from making an alteration in the order of succession; and accordingly, in the year 1643, it appears that he granted several procuratories of resignation, comprehending his honour, and comprehending all his estates, for a new investiture, to be given to himself, and the heirs-male to be lawfully procreated of his body, which failing, to his heirs and assignees, in his option, to be designat, nominat, made, and constitute by him, at any time in his lifetime, or before his decease, by assignation, designation, or declaration, under his hand-writ, and under the provisions, restrictions, limitations, and conditions therein to be contained.

My Lords, In the course of the same year, it appears that he

granted a bond, which is printed as No. 3. in the appendix to Colonel Walter Ker's case, proceeding upon a narrative of those procuratories of resignation; and by that bond he obliged his heirs-male, as well gotten of his own body as his heirs-male of tailzie and provision whatsoever, to ratify them in favour of the heirs whom he should nominate, and to renew them in case of his death, without having completed his proposed investiture by charter and infeftment.

My Lords, I ought to have mentioned to you, before I had come so low down in the history of these transactions as the year 1643, that Hary Lord Ker, who was in the year 1640 in life, did, in that year 1640, execute an instrument, to which a good deal of attention seems to be due, and, with reference to which, considerable argument, and, in some respects, weighty argument, as bearing (as far as one can borrow argument from one deed and apply it to another) upon the deed of 1648, was drawn, and addressed to your Lordships from the Bar. That was the bond of tailzie executed by him on the 18th July 1640; and that bond of tailzie is to this effect:—He binds and obliges himself and his heirs, to make due and lawful resignation of all and sundry the lands and barony of Primside, comprehending the particular lands mentioned in the infeftment granted to Robert Earl of Roxburghe, Lord Ker of Cessfurd and Caverton, his father, and to himself, in fee thereof, and so of all the towns, lands, and Mains of Sprouston, with houses, biggings, mills, and pertinents thereof, wherein he, and Dame Margaret Hay, Lady Ker, his spouse, (who, your Lordships recollect, is mentioned in the deeds of 1644 and 1648), are infeoffed by virtue of their contract of marriage, and also of all the lands of Sprouston called the West End of the Town of Sprouston, and so on, acquired from John Lord Cranstoun, and of the barony of Browndoun, with the pertinents, conquest and acquired from John Earl of Traquair, wherein his father is infest in liferent, and he in fee, and several other premises, for a new heritable infeftment and seisin to be given to him the said Hary Lord Ker, and to the heirs-male lawfully gotten or to be gotten of his body; which failing, to Lady Jean Ker, his eldest dochter. Then follow these words, which, in this instrument are extremely material words, as furnishing, in one way of putting the case, a construction upon similar words in the deed of 1648. Your Lordships recollect,

or will be put in mind when I come to state the deed of 1648, that a limitation is contained in that deed, to the eldest daughter, in the singular number, of the late Hary Lord Ker *without division*, and *their* heirs-male; and it has been contended below, and it has been insisted upon in judgment, and has been contended here, that those words, "*without division*," of themselves, go to the length of proving, that the words "eldest daughter" must be considered as a plural term,—as a term, which, though the expression is singular, must be taken to denominate a class of persons. Now, my Lords, it is impossible to say, that the words "Lady Jean Ker" can be taken to express a class of persons; for though the words "my eldest daughter" may in many cases be taken, I think, in our law, and I think also in the Scotch law, to mean a class of persons, yet when they are prefaced by the express name of an individual, they cannot mean a class of persons. The words here in this bond 1640, are these: "Lady Jean Ker, my eldest daughter." That can mean Lady Jean Ker, and that individual only. And then follow the words "*but division*," the meaning of which is the same precisely as *without division*; and that does shew this fact, that the words "without division" may be used, in a Scotch conveyance, with respect to a female taking, without its being the necessary inference from those words *alone*, that the singular term is meant to comprehend a class of persons. On the other hand, it certainly will not follow, if the words "*without division*" are usually applied as words which are to separate the enjoyment amongst persons who are described by a singular term, as, for instance, if the words were "heirs female *without division*," the effect of which I shall have occasion to state to your Lordships presently; it cannot, I say, on the other hand be contended, that they are words to which no weight whatever is to be ascribed, when you find them, in the deed, following a description which *may* either mean one individual, or *may* mean a class of individuals.

My Lords, There is another clause in this instrument, which it is necessary, in the history of the transactions of this family, to point out to your Lordships, as that upon which argument has likewise been offered to you, though I do not find that it was submitted to the Court below, which certainly is a passage of some importance. There are two passages, indeed; but there is one passage in this, which certainly is a passage of great importance: "In caice it

“ shall happen the said Lady Jeane, my eldest daughter, and
 “ failzing of her be decease, the said Lady Anna, her sister ;” her
 sisters Margaret and Sophia are not mentioned in this instrument,
 “ to succeed to the lands, baronies, and utheris above specified, be
 “ virtue of this present bond of tailzie and resignation, and
 “ infestment following thereupon ; then, and in that caise, it is
 “ speciallie provydit, that my said daughter sua succeeding, sall be
 “ halden and obleist to marry and take ane husband of honorable
 “ and lawful descent (be the advice of her maist honorable
 “ friends), who sall assume and tak to him the sirname of Ker,
 “ and carry and bear the arms of the hous of Cessfurd, and the
 “ bairns ” (perhaps your Lordships do not know that that means
 children) “ to be procreate of the said marriage sall continue in
 “ the samyn sirname of Ker, and beir the arms of the said hous of
 “ Cessfurd in all tyme thereafter ; or in caise my said daughter sua
 “ succeeding sall happen to marry ane husband of greater quality,
 “ be advice of her saids honorable friends, sua that he may not
 “ take the said sirname and arms, than, and in that caise, the
 “ *second son* procreate of the said marriage sall succeed to the
 “ lands, baronies, and utheris speciallie and generally above men-
 “ tionat, and be providit thereto, who sall take upon him the said
 “ sirname of Ker, and carry and bear the arms of the said hous of
 “ Cessfurd, and he and his heirs sall continue in the same sirname
 “ and arms in all time thereafter.”

My Lords, I presume to call your Lordships attention to this passage, because I think it cannot escape your observation, that it is extremely possible, judicially, to put a plural signification upon the singular term, which here occurs. The case put there, your Lordships see, is that of this Lady marrying a husband of greater quality, the consequence of which would be, that her eldest son would take the name and arms of that husband of greater quality, and not the name and the arms of the person who executes this bond. He then goes on to say, that the *second son* procreate of the said marriage shall succeed to his lands, baronies, and utheris, and bear the name and arms of the hous of Cessfurd, and shall so continue.

Now, my Lords, I think it would be a very narrow construction of this, to say, that these words, “ *second son*,” can mean nobody but the son of that marriage who is *second born*, that is to say,

that if there were four sons of that marriage, and the individual actually second born should happen to die, the third son would not be the second son within the meaning of this; or if the third son had died, that the fourth son would not have been the second son within the meaning of this; and if it could be said, as it can be, I think, that the third son was an individual who might become the second son in a certain event, it would be difficult, applying these rules to a Scotch instrument, to say that this singular term, '*eldest dochter*', even in this ancient instrument in 1640, might not, in given events, be a term sufficiently available to describe a class of persons taken successively; or a class of persons taken in this sense, that in one event one would take, in another event another would take, and in another event a third would take.

The deed then proceeds to state, that if it should happen that the said Lady Jane his daughter, and failing of her, Lady Anna, her sister, also his daughter, or any of them who should happen to succeed to these lands, baronies, and so on, by virtue of that tailzie, failed in doing or fulfilling the premises, then it is specially provided, that the infestment, and that present bond made thereanent, so far as concerns her part thereof, should be null, and of no avail from thenceforth, as if she were naturally deceased, and the next person provided to the lands and others aforesaid by virtue of that present bond of tailzie, should succeed thereto; and his said daughter and her heirs so failing, shall be holden and obliged to denude themselves of the right of the lands, baronies, and others, to and in favour of the *next person* provided thereto by this present tailzie. Here is also a singular expression, "the next person provided thereto by "this present tailzie," which would not mean, your Lordships observe, the person who, at the instant of executing this tailzie, was the next person provided thereto, but the person who, at the time that tailzie took place, was the next person provided thereto, and who would, under this instrument, have a right to take the benefit meant in the case of a failure of the daughters and their heirs-male, to be given to the next person then provided thereto; but here also is, in a sense, a singular term, describing more persons than one, though eventually describing but one person.

My Lords, Having stated to your Lordships the effect of the bond of 1640, I return to what I was before about to mention to you, the charter of 1644. I give it the name of charter, though perhaps it

would be called with as much propriety a deed of designation, nomination, and tailzie. In this, it is necessary to point your Lordships attention to the circumstance, that, towards the close of it, there is a clause, which, for want of a better word to apply to it, I would describe as a power of revocation; and, notwithstanding what has been argued at your Lordships Bar with respect to this instrument, that, on the one hand, it has been said, that it is an absolute nullity, that it is altogether revoked; and, on the other, it has been insisted, that it is still an existing instrument, — that it has been carefully kept in the charter chest, — that it was found with the other muniments and documents of the title; it does, I confess, appear to me to be an instrument, that, whatever might be its effect between 1644 and 1648, it is in this sense a revoked instrument, — that it is an instrument which, except in a very limited way, which I shall hope to point out to your Lordships distinctly by and by, cannot affect the limitations contained in the deed of 1648, or the limitations contained in the subsequent instruments which regulate this title. At the same time, this deed of 1644, in my apprehension, is a deed which is not to be altogether overlooked by your Lordships, when you are endeavouring to collect, not what the author of the deed meant to do, but what is the meaning of words in an instrument of conveyance, which an individual has actually used, when he has used the same words in both instruments. I cannot, for instance, with reference to the deed of 1648, contend, consistently with any notions I have of law or of evidence, that because the author of the deed of 1644 expressly created a succession among the daughters of Hary Lord Ker, by express and technical limitations, that therefore he intended to do the same thing in the deed of 1648. I must, according to my notions of law and of evidence, find in the deed of 1648 itself, that he has done it; and I can never infer, I think, rationally, from a deed executed in 1648, which, *ex concessu*, was meant as a deed to bring about some alteration, that because he intended a particular provision by the deed of 1644, and because you collect from the deed of 1644, that according to that intention to create particular limitations, he did actually create them, you are therefore to infer he did the same thing in 1648, unless, upon looking into that instrument of 1648, you find he did actually so do. But I take it to be equally clear, that there may be more ways than one of doing the same thing. I apprehend, that if, upon looking into two instruments, you find the same expressions,

you may form an opinion, that they have the same meaning in each. It seems to me to be a legitimate purpose, to look at different instruments, to see how, in the language of conveyancing, singular terms are employed to describe a plurality of persons; and I think that you may legitimately reason in the same way from the deed of 1644 to 1648, as I took the liberty, in a short word, to do, from the bond of 1640 upon the words "but division," with reference to the term "without division" in the deed of 1648.

I ought to state to your Lordships what was the state of the family of this Earl of Roxburghe in the year 1648; and it is necessary to do so, with a view to call back to your Lordships recollection the reasoning which has been offered on both sides; on the one side, the reasoning holding forth the eldest daughter of Hary Lord Ker as the *persona dilecta* of the Earl of Roxburghe in 1648; on the other, the reasoning which has aimed at representing as a gross improbability the supposition, that the Earl of Roxburghe could mean to give exclusively to his eldest daughter, without giving to his younger daughters, that which he had not given exclusively to his eldest daughter marrying a Drummond, but had given to all his daughters, if they married particular persons pointed out to them; it is, I say, necessary to call back your recollection to the state of the family at this time: because on referring to the state of the family, your Lordships will see, that there was great ground for that which was urged; I mean, that the provision made by the charters of 1644 and 1648, with reference to the actual state of the Earl's family, is a provision in itself so whimsical, that it is difficult to argue at all from any supposition that any persons were his *persona dilecta*; and that there is as good ground for arguing, as they have argued, that he has overlooked the three younger daughters of his son Hary Lord Ker, as that he should overlook the children of other younger branches of his family.

In the year 1648, it appears that Hary Lord Ker was dead. His father, the first Earl of Roxburghe, had been twice married. He first married Mary, the daughter of Sir William Maitland, and by that marriage he had one son and three daughters,—William, the Master of Roxburghe, who died without issue,—Lady Jane Ker, who married the second Earl of Perth, and had issue,—Lady Mary Ker, who married Henry Lord Dudhope, by whom she had issue a son,—and Lady Isabella Ker, who was married, first, to Halyburton of

Piteur, by whom she had no child, and, secondly, to James Earl of Southesk, by whom she had children. Lady Jane Ker, who had married John the second Earl of Perth, had issue,—Henry Lord Drummond, who died without issue,—James, who was afterwards Earl of Perth, who had several sons and daughters,—his third son, John Drummond, had issue,—his fourth son was Sir William Drummond;—and she had also two daughters, Lady Jane Drummond, who married John, the third Earl of Wigton, by whom she had six sons and two daughters, and Lady Lilius, who was married to James Earl of Tullibardine, by whom she had issue. My Lords, Lady Jane Drummond, who married the Earl of Wigton, had issue, John Lord Fleming, who was the fourth Earl of Wigton, and who married Lady Anna Ker, second daughter of Hary Lord Ker,—Robert Fleming, Henry Fleming, James Fleming, William Fleming, and Charles Fleming. This is the state of his family by his first wife.—The following was the state of his family by his second wife. Hary Lord Ker was dead. Hary Lord Ker had left behind him, Lady Jane, Lady Anna, Lady Margaret, and Lady Sophia Ker.

In this state of the family of the Earl of Roxburghe, he executes the deed of 1648; and in executing that deed he passes over his eldest daughter Lady Jane Ker herself: he does not pass her over absolutely, because he makes a provision for some of her issue; but with respect to any personal provision for her own individual benefit, he passes her over. His next eldest daughter by his first marriage, Lady Mary Ker, he takes no manner of notice of;—his own still younger daughter by his first marriage, Lady Isabella Ker, he takes no notice of: so that looking to this instrument of 1648 as a provision for the family, it appears that he makes no provision for Lady Jane Ker, the eldest. He does not limit the estate to her, but he does, in the manner I shall mention, limit the estate to one of her sons, and he passes over, in making this provision for the family of the eldest daughter, he passes over his own youngest daughters altogether, and takes no manner of notice of them. His first limitation is to Sir William Drummond, who was, upon the pedigree I have stated to your Lordships, fourth son of the Earl of Perth, passing over the three eldest sons. After Sir William Drummond, he proceeds to take as his second substitute Robert Fleming, who was the second son of the eldest daughter of Lady Jane Ker. He passes over, therefore, the eldest daughter of Lady

Jane Ker herself, but makes a similar provision for one of her children that he had made for Sir William Drummond, one of the children of Lady Jane Ker, and he then makes his third substitute Henry Fleming, his fourth James Fleming, his fifth William Fleming, and his sixth Charles Fleming, passing over again both his grand-daughters, Lady Jane Drummond, afterwards Lady Wigton, and the Lady Lillas, afterwards Lady Tullibardine; so that in the line, your Lordships observe, which descended from his first wife, he makes no provision for his own first daughter, though he does for the descendant of that daughter; he passes over his own younger daughters, and when the descent goes on further from him, he passes over three sons of Lady Jane Ker, his eldest daughter, he passes over the first son of Lord Wigton, and then he proceeds to limit the estates to the second and other sons of Lord Wigton, passing over his youngest grand-daughters, the daughters of Lady Jane Ker; from which it is argued, and I take notice of the circumstance, in order that the parties may be satisfied that I have noticed it, that, if he could pass by his own younger daughters, and his own younger grand-daughters by his first marriage, and could give a preference to the descendants of the eldest grand-daughter by the first marriage, it could hardly be predicated of him, that, with respect to the grand-daughters of the second marriage, he could not mean to make the same sort of provision, and pass over the three youngest of those grand-daughters.

My Lords, This deed of 1644 contains some passages which I think ought to be pointed out to your Lordships attention; not, I say, as evidence that he who made the deed in 1648 meant the same thing as he meant by the deed of 1644, when his purpose in 1648 was to revoke the deed in 1644, and to make other provisions; but with reference to ascertaining what is the legal meaning of the language which is used. After making these provisions as to the Flemings marrying his daughters, and after making the provisions, which your Lordships will recollect, naming the third daughter as if she was the second daughter, and the second as if she was the third, he proceeds to notice the case of the four younger sons of the Flemings, the elder not succeeding under the limitation, by not observing the conditions, and then he says, "Thaine and in ather
" of these causes We have designet nominate and appoynted and
" be thir pntts designes nominattes and appointes—" Now, I beg

your Lordships attention to these words, "the imediate next eldest
 " lawll sones" in the plural number, "of the saidis Johne Lord
 " Flemyng and Dame Jeane Drumound his lady being ime-
 " diatelie next in birthe to thair eldest sone and aire ilk ane of them
 " successive after uys To be the persounes wha sall succeed to us
 " in our sd estate landes baronnies and uys abovespectt, They
 " alwayes mareing and taking to yr lawll spousez the eldest lawll
 " dochter of the sd Lord Ker our sone being on lyffe and
 " unmarried for the tyme And they and yr aires maill forsaidd of
 " the said mareadge keipand performand and fulfilland the hail
 " remanent conditiones of this pnt nominatioun."

My Lords, The words which I have read to your Lordships constitute a description of persons which must admit of construction, because they require construction. It is absolutely impossible to give them the effect they have in common parlance, this is to "the imediate next eldest lawll sones of the saides Johne Lord "Flemyng and Dame Jeane Drumound his lady being ime- "diatelie next in birthe to thair eldest sone." Why, a sixth son, in the language of common parlance, could not be said to be next in birth to their eldest son; but he might become next in birth to their eldest son by the failure of his intermediate brothers; and these words, at the moment of the execution of this deed, might describe one person, and at the time that they would be to be acted upon as a limitation taking effect, they might describe an entirely different person; and this shows therefore that you must get at the meaning of the words, by construing each word with reference to every other word, and by construing the whole with reference to the context in which the words occur, "They alwayes mareing "and taking to yr lawll spousez the eldest lawll dochter of the sd "Lord Ker our sone." Now the eldest daughter of Lord Ker, in common parlance, would mean Lady Jane Ker; but that the eldest daughter of the said Lord Ker, our son, may mean at one time Lady Jane Ker, under the effect of this instrument, at another time Lady Margaret Ker, and at another Lady Anna Ker, is clear by the words which follow here, which are, "being on lyffe and un- "married for the tyme;" and the question, therefore, under any other instrument would be, whether the words, "eldest lawll "dochter of the sd Lord Ker," being proved in this context to be words not necessarily, and in every point and period of time

describing the same ascertained individual,—the question in every other conveyance would be, whether there are words in it to show that the terms, “eldest lawful daughter of Lord Ker,” would necessarily mean a class of persons, taking them together with the context, as clearly as the words, “being on lyffe and unmarried for the tyme,” prove such a meaning; for there is no contending that those are the only words in the language capable of giving such a construction to the words which precede them.

So again, my Lords, it is necessary to ascertain the construction to be given to the words in this clause, “their aires-maill,” “and yr aires maill forsaid of the said mareadge keipand perform- and and fulfilland the haill remanent conditiones of this pnt nominatioun.” Now it is stated as a proposition generally true, as it undoubtedly is, that the words heirs-male do not mean heirs-male of the body; I mean do not mean heirs-male of the body in Scotland;—still, if they are heirs-male of the marriage, they may mean heirs-male of the body: and if the question were to arise therefore upon this instrument, I am satisfied that your Lordships could be driven by no precedent necessarily to say, that these words, “heirs-male,” meant heirs-male, not merely of the body, but heirs-male generally, when the author of this deed has said that they mean heirs-male of the marriage.

Then follow these words: “And falzeing of all the befornamit persouns be deceis or not performance of the forsd conditiones In that caise we have designit and be thir pntts designes the saides Lady Jeane Margaret Anna and Sophia Kers our oyes And falzeing of the first the next imediate eldest of the sds dochters successive after uys and yr aires maill lawlie to be gottine of yr bodies to be the persoune wha sall succed to us in our sds landes baronnies erledome and uys abovewrn.” Here, your Lordships observe, is an express limitation, that the daughters are to take successive; and I mark that as I go along, because the insertion of such an express limitation in this instrument, and of such a limitation as that which is to be found in the deed of 1648, are the two facts which must be put together, when you come to reason what is the effect of that obscure passage in the subsequent deed of 1648; but I cannot pass this over without saying, that if the word successive had not stood part of this sentence, I should have held it indisputably clear, that the meaning

was exactly the same: for if it had stood, "And falzeing of the
 "first the next imediate eldest of the sds dochters after uys
 "and yr aires maill lawlie to be gottine of yr bodies to be the
 "persoune wha sall succeid to us in our sds landes baronnies
 "erledome and uys abovewrn," I think it must have been indis-
 putably clear, that that would have created a succession without
 the word successive. And I have to call your Lordships attention
 here to the singular word "*persoune*;" for it cannot be doubted,
 that that word, in the consideration of what might be the necessary
 actual application of it, when an application of it was called for,
 with reference to a person to succeed, might be applied to a person
 at that time, to whom it would not be applicable at the time the
 instrument speaks, that is, at the time of its execution, as describing
 a person who, in a future event, might be the person to whom only
 it could be applied, and to whom, therefore, necessarily it must be
 applied.

My Lords, This goes on to say, "They alwayes mareing and
 "taking to yr lawll spouss ane gentilman of the name of Ker of
 "lawll and honoll descent." Your Lordships observe that as the
 singular term person, in the former part, must mean persons, so
 the plural term here must mean they and each of them. It must
 be singular and plural. "They alwayes mareing and taking to yr
 "lawll spouss ane gentilman of the name of Ker of lawll and
 "honoll descent and yr saides husbands and yr aires forsd taking
 "keiping and reiteining the sd surname of Ker and arms of the
 "sd hous of Roxburghe allendarlie in all time yrafter As also
 "performand the remanent conditiones of this pntt nominatioun
 "And falzeing also of all the sdes persounes be deceis or not per-
 "formance as sd is In that caise we have designit and be thir
 "pntts signes and appoyntes our narrest and lawll air maill
 "qtsuemever being ane gentilman of the name of Ker of lawll
 "and honoll descent and the aires maill lawlie to be gottine of his
 "bodie." Your Lordships will permit me to observe, that here the
 Ladies were required to take a gentleman of the name of Ker in
 marriage. That was not the case in the deed of 1648. The person
 who was to take under this last limitation was to be a gentleman
 of the name of Ker, entitled, as I understand, lawfully entitled to
 the name of Ker, of lawful and honourable descent, which is not
 the case in the deed of 1648.

Then, my Lords, there is another clause, which it is necessary also to call your Lordships attention to, and that is a clause with reference to the portions. "In caise it sall hapine the said " Sir William Drummond or ony others of the persounes either " particularlie or generally before namit and thaire aires maill forsd " lawlie to be gottine of yr bodies being maried as sd is or ony " of them to succed to us in the said estate and living be verteu " of thir pnts That thane and in that caise the samyne persone " sua succeeding and yr spouses" (There the word person clearly must mean, not an individual who could be described at that time, but individuals who were to succeed one after another, and who might therefore be said, though described by a singular term, with great propriety to be a person who might have their spouses,) "to be joyned in mareadge with them and thair aires " maill forsaides sall be haldine and obleist to content and pay To " the remanent dochters befornamitt of the said umql Hary Lord " Ker the severall soumes of money afterspectt ilk ane of them " for yr awne pairts as is after devydit to witt give thaire be onlie " ane of them to content and pay to the said dochter the soume " of Fortie thousand merkis usuall money of this realme And give " thaire be only twa of them on lyffe to content and pay to the eldest " the soume of Threttie thousand merkis good and usuall money " forsaid" (Your Lordships will recollect these portions are enlarged in the deed of 1648,) " And to the youngest the soume of " Twentie fyve thousand merkis money And give they be all thrie " on lyffe to content and pay to the eldest the soume of Threttie " thousand merkis usuall money forsd To the second the soume of " Twentie fyve thousand merkis money foirsaid And to the youngest " the soume of Twenty fyve thousand merkis money foresaid and " that sua soune as they sall be of the aige of sexteine zeires " Providing that in caise it sall happine any of the sdes dochteris" (which might be one of them; for though there were three, that might describe either two or one,) "to depart this lyffe befor they " be of the age forsd," (Now, if one daughter died, you would be obliged to construe that word as if it were she; and if two daughters died, you would be obliged to construe any of the said daughters as meaning either of the said daughters. That is another passage that tends to shew, that a plural word is sometimes used, which must be applied to a single person), " or zitt before they be

“ married In that caice” (This I would also draw your Lordships attention to,) “ the portioun of the sd dochter sua deceisand sall
 “ returne to our said air and nawayes fall to the rest of the saides
 ‘ sisteris yr aires nor exers.” Now there also the singular term
 portion, and the singular term daughter, might, by events, be
 necessarily construed to mean portions and daughters; and the
 plural term sisters, their aires and successors, might, by the course
 of events, be made to define one and one only.

My Lords, I have nothing further to observe upon this, except
 calling your Lordships attention again, in a short word, to that
 which I have termed the power of revocation, and which is in these
 words: “ But prejudice alwayes to us at any tyme during our lyfe-
 “ time to discharge reforme alter or renew thir pnts as we sall
 “ think expedient.”

My Lords, the next instrument which it is necessary to take
 notice of in the course of these transactions, is the charter in 1646,
 and that charter, it is necessary to observe upon. The lands were
 granted to him, and to the heirs male of his body, with remainder,
 “ heredibus suis vel assignatis quibuscunque, in ejus optione,
 “ designandis, nominandis, vel constituendis per ipsum, aliquo
 “ tempore in vita sua, vel ante ejus decessum, per assignationem,
 “ designationem, nominationem, seu declarationem, sub sua sub-
 “ scriptione.” From this I infer, that as early as 1646, and there-
 fore earlier than 1648, the Earl had made up his mind, that the
 regulating instrument of his title should not be that deed of 1646,
 because your Lordships observe, that he alludes clearly to some
 instrument thereafter to be executed.

My Lords, In 1648, he executed that deed or charter upon
 which the controversy has principally turned at your Lordships
 Bar; and it is necessary, in order that this case may be fully
 understood, and with clearness, to lay before you the principles
 which govern the judgment of the individual who addresses your
 Lordships, first to state the effect of that charter.—The person first
 called is the same Sir William Drummond, as “ youngest lawful sone
 “ to ane Noble Erle Johne Earl of Perth and the airis-male lawfully
 “ to be gottin of his body with his spouse after mentionat.” Here,
 my Lords, is the first alteration to which it will be necessary for
 your Lordships to advert, that the heirs-male of Sir William Drum-
 mond who are to take under the deed of 1648, were to be the

heirs-male of the body of Sir William by his spouse after mentioned, which is repeatedly after mentioned; and it is material to notice that, because it has been intimated, that under the deed of 1644 there might be heirs-male of Sir William Drummond who might take, who would not necessarily be his heirs-male by any of the daughters of Hary Lord Ker. Perhaps that will admit of more doubt than seems to have been thought to belong to that question; but under this deed of 1648, that no other heirs-male could take under the effect of this limitation, is abundantly clear. He proceeds then to limit the estates to the second lawful son of John Lord Fleming, and Dame Jean Drummond, his Lady, and the heirs-male of his body; then to the third son, and then to the fourth lawful son of John Lord Fleming, and his Lady. And here your Lordships will allow me to call your attention to the manner in which he calls, in this tailzie, the younger Flemings: "we by
 " thir presents nominate declare and constitute the next immediate
 " eldest lawful sones of the said Johne Lord Fleyming, procreate
 " or to be procreate betwixt him and the said Dame Jeane Drum-
 " mond his lady and the airis-male lawfully to be gottin of their
 " bodies with their spouses respective after nominate."

Now, my Lords, although it be perfectly clear, that the institute here mentioned, as the youngest lawful son of John Earl of Perth, could not, by any possibility, mean any person but Sir William Drummond, because it is a description of Sir William Drummond, he being also described *eo nomine*, Sir William Drummond, and that the second lawful son of Lord Fleming could mean no body but Robert Fleming, for the same reason, because he is named, and so that the third and the fourth lawful son could mean only those individuals who are named by their Christian and Surnames; yet, my Lords, would it be difficult or impossible to say, that where such a general term, as the next immediate eldest lawful sons, is found, and which is not limited in its construction by the actual use of those words which constitute name and surname, and where the purpose was to create a succession, that that term could mean others than the fifth son, and that it did mean the sixth, seventh, eighth, ninth, or tenth? Here construction is not only admissible, but no effect whatever can be given to the deed, unless you do admit it, because this is without a single word expressive of the idea of succession; this is a limitation to the next immediate eldest

lawful sons of the said John Lord Fleming, to the whole of them described as sons by the plural term, and to the heirs-male lawfully to be begotten of their bodies. I presume it cannot be contended, that that was a limitation under which all four of these sons could take at once shares descendible to the heirs-male of their bodies lawfully begotten. Why, then, if all the sons are not so to take, how can they take unless *successivè*; and if they take *successivè*, by what term are they so to take, there being no such term as *successivè* in the instrument, unless it is by virtue of these terms which form the whole description? the meaning of the whole being put together, and that meaning being collected from the context, and the whole of the context in which those words occur. These therefore are extremely material words in this deed of 1648, as shewing what it is that the author of this deed of 1648 means, when he connects plural terms with singular terms, and singular terms with plural terms. It cannot be denied, I presume, that you may, from the construction of each and every word, see what is the proper construction to be put upon the whole of the words.

There then follows this clause, to which I would call your Lordships attention: "And als providing that the said Sir William Drummond and failing of him by decease or in case of his marriage or not observing of the conditions above and after mentionat the next person," in the singular number, "havand right for the time to succeed,—" I call your Lordships attention to the words "to succeed." Here is *person* in the singular number connected with the idea of succession, as expressed in the terms "havand right for the time to succeed as said is sall marry and take," to what? to *his* lawful spouse? No: it is "sall marry and take to *thair* lawful spouse." Then, my Lords, I say, if you were to ask me at the time this instrument is executed, who is the next person having a right for the time to succeed, I should reply, that it is the person named in the settlement who is next to succeed; but if you asked me who that means at the time a former substitution fails, that person who was next to succeed at the time of the execution of the deed might not be the person who was then next to succeed; and the question is, Whether it is not matter of necessary construction, in order to carry into effect the conditions and restrictions of this deed, that you should say that the singular term, "the next person," is meant to describe a plurality of persons

taking certainly individually when they do take, but a plurality of persons under a singular phrase, and is not that demonstrated by the plural pronoun "their," as coupled with these words, the next person and their spouses?

My Lords, I know it has been said, the meaning would have been exactly the same if it had been "the next person, and his spouse:" the meaning would have been the same; but still the singular term, *the next person*, and the singular term, *his*, would have described, in two events, very different persons. They, therefore, would be terms apt enough to describe more persons than one, according as they were used in their connection: the individual who was to be taken to be their lawful spouse, was Lady Jane Ker, eldest daughter of Hary Lord Ker. I press upon your Lordships attention this phrase, to satisfy the parties, that you have not forgotten that a great deal of stress was laid upon this expression; that in this very deed, upon which has arisen this discussion, Lady Jane Ker is expressly described as being the eldest lawful daughter of Hary Lord Ker, Lady Anna Ker is here stated to be the second daughter of Hary Lord Ker, who, in the deed of 1644, had been stated to be the third daughter of Robert, and Lady Margaret is put in her proper place.

There then follows a clause, upon which a great deal of argument has been used, as to taking the name of Ker, and bearing the arms of Roxburghe: "In caice of failzie or that they refuis or " forbere to assume and tak upon them the said sirname of Ker " and carry and bear the said arms of the house of Roxburgh In " that caice the person failzier and the airis of thair body sall " amit and tyne the benefit of the tailzie and succession." There is another part to which I would call your Lordships attention. " In that caice the person or air of tailzie sua failzeand,"—but that I may pass over; and that brings me to the particular clause in this instrument upon which the question mainly arises: " And " qlkis all failzeing be decease or be not observing of the provi- " sions restrictions and conditions above written The right of the " said estate," in reference to which, as your Lordships know, there is a great deal of contest, whether it will pass the dignities, as well as the lands, " The right of the said estate sall pertain and belong to " the eldest dochter of the said umq^l Hary Lord Ker without division " and y^r aires-male she always mareing or being married to ane " gentilman of honour^l and lawful descent wha sall perform the

“ conditions above and under written ” and then follow these words : “ qlkis all failzing and y^r sds airis-male to our nearest “ and lawful airis-male qtsomever.”

My Lords, The question between these parties arises principally upon this clause. Sir James Innes Ker says, that these words, the eldest daughter of Hary Lord Ker, without division, and their heirs-male, mean the daughters in succession ; and that as Margaret, on the failure of the former daughter, became, in a sense, eldest daughter, he, descending from her, as the heir-male of her body, is entitled to these estates and these dignities. He contends further, that the words their heirs-male do not mean heirs-male whatsoever, or heirs-male in the general sense, but that the context shews that they mean heirs-male of the body. On the other hand, Colonel Walter Ker insists, that these words, eldest daughter, are descriptive of Lady Jean Ker, described, in the former part of the deed, as eldest lawful daughter of Hary Lord Ker : and he further contends, that the words, their heirs-male, do not mean heirs-male of the body, but heirs-male generally ; and that therefore, whether this created an estate in the eldest daughter only, or created an estate to be taken by the successive daughters, yet no third can take to the first and second, until heirs-male general of the first and second have failed, and he states himself to be the heir-male general of Lady Jean Ker, as well as the heir-male general of Robert the first Earl of Roxburghe, and of Hary Lord Ker ; and that therefore, upon that construction, he is entitled as such.

Mr. Bellenden Ker, on the other hand, cannot agree with either of them. He says, together with Colonel Walter Ker, that eldest daughter means Lady Jean Ker ; but he says, together with Sir James Innes Ker, that heirs-male does not mean heirs-male generally, but heirs-male of the body ; so that, upon one point, he contends with Sir James Innes Ker, and on the other point, with Colonel Walter Ker. My Lords, It is further insisted, upon the part of Mr. Bellenden Ker, as against both these other competitors, that this clause really is not a clause which creates heirs of tailzie ; they call it in the argument a devolution-clause, a clause of return, and a great variety of other names : but Mr. Bellenden Ker insists, that the individuals here described, however the description may suit, are not individuals whose rights and interests are affected as heirs of tailzie.

I would now call your Lordships attention to the words, “qlkis all failzing and y^r sds airis-male;” and there are two constructions which have been put upon these words. Upon the part of Sir James Innes Ker, it is contended, that the words, “qlkis all failzing and “y^r sds airis-male,” mean, all which daughters failing, and their heirs-male. On the other hand, it has been contended by other parties, that that is not so; that “which all failing” does not mean, which daughters all failing, but which substitutes all failing; and that if the eldest daughter, or other daughters, and their heirs-male, have failed, that lets in the claim of lawful heirs-male whatsoever.

My Lords, Before I part with this, your Lordships will give me leave to remark, that we have had a great deal of argument upon the Latin translation. Now I think I do not presume too much when I say, that I should think the Court of Session in Scotland were just as good interpreters of these Scotch words as the Latin translator of a charter; and that to put it at the highest, you can only look at his translation as a judicial opinion what those Scotch words meant. In the first retour, as I understand the case, the word *their*, which stands in the original, is construed *earum*. If that be a right construction, *earum* must, of necessity, mean the heirs of the daughters. *Ejus* could not describe daughters; *earum* could not describe males: therefore, if the translator is right in making it *earum*, his opinion is, that the words, their heirs-male, mean the heirs-male of females, and of more than one female; but if we are to take the authority of the same translator, and put him upon the Bench in the Court of Session for this purpose, when he came to construe the words, which all failing, and their said heirs-male, he construes this word, not *earum*, but *eorum*. Now it is impossible that that can mean the daughters: it may mean the daughters and their heirs-male, because *eorum*, which is a masculine term, may include both, or it may mean all the former substitutes and their heirs-male. My Lords, in some other of the instruments, which we see afterwards, you find this word is construed by the word *ejus*, which I think would make no great difference; but this word *their* has, in point of fact, admitted of all these different translations, which are just so many constructions put by the men of business of the parties upon the instrument now before your Lordships.

My Lords, I cannot part with this, without another observation,

with respect to those who contend, that these words, "which all failing, and their said heirs-male," mean, not the heirs-male of all the daughters, but the heirs-male of all the substitutes. It is impossible for them, consistently with that, to contend that heirs-male *may not* mean heirs-male of the body, because the heirs-male of the former substitutes are all heirs-male of the body; and therefore, when they construe these words, they must say, that as far as they are applicable to the former substitutes, they mean heirs-male of the body; and that as far as they are applicable to heirs of the daughters, they mean heirs-male generally; and if they do that, they admit, that heirs-male is a flexible term, and may mean both heirs-male generally and heirs-male of the body.

Your Lordships will permit me now to point out that clause in which the portions are given. I should first have stated to you a clause, by which he obliges himself and his heirs-male to denude themselves of what have been called the estates acquired, and to convey those estates acquired to his heirs of tailzie, and the heirs of their bodies lawfully begotten. I mark the passage with respect to the portions, because it will require some particular observation. It is in these words: "And in like manner it is specially provided be express condition hereof that in case it sall happen the said Sir William Drummond or ony utheris our airis of taillie and provision specially or generally before mentionat or ony of them to succeed to us in the said estate and living be virtue of thir pntis That then and in that case the samen persone" in the singular number "sua succeeding and y^r spouses to be joined in marriage with y^m and y^r airis-male foresaids sall be halden and obliged To content and pay to the remanent dochteris" certain sums. This is another passage in which your Lordships see plural words are connected with singular words, and so connected with singular words as to prove that singular words merely may mean a class of persons; for these words imply a plurality of persons. I would shortly observe to your Lordships, that the portions are enlarged by this deed; and then there are several other passages which afford some observation, but which I cannot state to your Lordships to be observation material enough to justify me in taking up your Lordships time by stating the remaining part of this deed.

My Lords, Having now proceeded to detail to your Lordships

the effect of this settlement of 1648, and recollecting that it is my duty to pay attention to the convenience of the House, instead of asking the attention of the House to my convenience, I would in this stage of the business, if your Lordships would give me leave, adjourn the continuation of this matter until the rest of the business of the House is concluded; meaning when that is concluded, if your Lordships will give leave, to proceed further to-night, if there should be time. If, on the other hand, that business should detain your Lordships too long to admit of such proceeding to-night, I then propose to resume the discussion of it at an early hour to-morrow.

SECOND DAY. *Friday 16th June 1809.*

MY LORDS,—I proceeded, with your Lordships indulgence, in the course of yesterday, to the extent of stating to your Lordships the contents, with some observations upon them, of the deed of 1648, with the history of the transactions in this case to that period. I now resume the consideration of the subject, after stating to your Lordships, what it has since occurred to me I forgot yesterday, a passage in the deed executed by Robert Earl of Roxburghe in 1648, which is a passage material to be pointed out to your attention, because it shows, that at a period so early as that, (and indeed many instruments of an earlier period shew it,) there was a known distinction, generally speaking, between the description of heirs-male of the body of a person, and a person's heirs-male. The passage to which I allude is the obligatory Clause in the deed of the 7th of November 1648, where the Earl states, " Therefoir wit
 " ye us to be bund and obleist, likeas we, be thir presents, binds
 " and obleises us and our airis-male, als weil gottin of our awin
 " bodie, as our airis-male, taille, and provisione whatsumever,
 " to ratify and approve the particular letters of prory of resigna-
 " tiounne rexive above spect, maid be us, for resignatiounne of the
 " lands, baronies, and utheris *respectivè* above written, of the daitts
 " and contents above mentionat, in all and sundry heids and con-
 " ditions thereof, and binds and obleises us, and our saids heirs-
 " male, als weil gottin of our awin bodie, as airis-male, tailzie, and
 " provision whatsumever, to renew the samen prories in favor' of
 " the saidis airis-male to be gottin of our bodie, and the airis of

“ taillie specified in the saidis prories of resignation, after the forms “ and tenors thereof.” I need not detain your Lordships by reading other passages in the same instrument, in which the same form of expression and description of heirs occurs.

My Lords, I would take notice now, that the clause beginning with the words “ eldest daughter and their heirs-male,” in the deed 1648, appears to have been written, as your Lordships have been informed by the fac-simile, which has been laid upon the table, in a blank, which has been supposed to be too small for a clause of substitution of the four daughters expressed in the same manner as that clause of substitution which appears in the deed of 1644, with reference to which, therefore, it has been conjectured, that Mr. Learmont and Mr. Don,* whose names have frequently occurred in these discussions, were trying which could be the best abridger, and who could put the most of the *multum in parvo*. As to this, it is enough for me to say, and I shall trouble your Lordships no further, that I cannot conceive a more dangerous principle to be introduced into judicial construction, than that of giving yourselves permission to suppose that you can judicially construe an instrument with regard to such a circumstance. Indeed in this case, without entering into general considerations, every inference that could be drawn from the circumstance of the vacuity in the parchment being so small, would be done away by what appears in the margin, by an insertion in the margin. I am almost afraid to state such an observation as that; because if we are to be considering, with reference to any deed, what we are to allow to the difficulty of writing large or writing small, in a blank in parchment to be filled up, and to be attending to the more or less of difficulty that belongs to the compressing a larger or a smaller quantity of words into a blank, it appears to me, we give ourselves a liberty which, in judicial matters, it would be the most dangerous thing in the world to take. But as to that deed 1648, this is a circumstance worthy of no judicial consideration whatever, when you see a marginal insertion.

My Lords, I will now point out to your Lordships the fact, that there was a parliamentary ratification of the charter of 1646, and of the infestment of 1648; the effect of which parliamentary ratification, your Lordships will recollect, has been discussed a good

* John Leirmount servitor to John Leirmount W. S. wrote the most part of the deed 1648, and Alexander Don, clerk of Kelso, wrote the deed of 1644.

deal in the Committee of Privileges. It is not necessary to consider it with reference to the estates, and therefore I do not trouble your Lordships with any further observation upon it at this moment.

My Lords, It appears that the Earl of Roxburghe died in the year 1650. Sir William Drummond, who was the institute in the charter of 1648, made up titles to him by service, as heir of tailzie and provision; and if we could look satisfactorily at instruments which could be stated to be the most contemporaneous with the deed of 1648, and if we could look at those instruments as containing any thing of judicial authority, merely because they happened to be translations of a Scotch deed into Latin, your Lordships would find that the word *earum* is probably the oldest and the most contemporaneous construction put upon the words in this clause, "their" heirs-male; and yet your Lordships will permit me to say, you should not be too certain of that, because I have seen *earum* upon parchment, where I could not be quite sure that it stood so originally.

My Lords, Upon the death of Robert Earl of Roxburghe, Sir William Drummond made up titles, and Sir William Drummond certainly seems to have been reasonably attentive to the invitation given him to marry Lady Jean Ker; for he does, in compliance with the injunctions of the entail, in 1655 marry that Lady, and to give still greater validity to his title, as it is stated, he obtained a decree of adjudication in implement on the bond granted by Earl Robert in 1643.

In 1655, your Lordships will recollect, that a bond of marriage was executed between this Sir William Drummond and Lady Jean Ker, and which contains expressions and provisions, to which it is necessary to request your Lordships attention. It is executed, your Lordships know, upon the 17th, or some other day in May 1655. "It is appointit, contractit, and finally agreit, betwix the honorable parteis undernamit; to wit, betwix ane Noble Earl, William now Erle of Roxburghe, Lord Ker of Cessfurd and Cavertoun, on the ane pairt, and Lady Jean Ker, eldest lawful dochter to the deceist Harie Lord Ker, with advyce and consent of her honorable friends and curators under subscriyving, and of ane Noble Countess, Dame Margaret Hay Countess of Cassilla, her mother, and of ane Noble Erle, John Erle of Cassilla, Lord

“ Kennedy, her spouse for their interest, on the other pairt; in
 “ manner, form, and effect, as after follows.” It then recites this
 charter of the 23d of February 1648 pretty much at length: it
 recites the intended marriage; and then, in this deed, there are the
 following provisions. “ It is alwise hereby provided, that in case
 “ there shall happen to be a son of the marriage betwixt the said
 “ Noble Erle and the said Lady Jean Ker, to succeed to the estate
 “ of Roxburghe, and living during the lyfetymes of the said Coun-
 “ tess of Cassillis and Countess of Roxburghe *respectivè* living both
 “ together; and failing of a son of the said marriage, in case any
 “ other of the said deceased Harie Lord Ker’s three dochters, viz.
 “ Lady Anna, Lady Margaret, or Lady Sophia Kers, shall happen
 “ to be Countess of Roxburghe, *by marrying of any of the rest of*
 “ *the aires of taille* who shall succeed to the said estate; in these,
 “ and ather of these cases, during the joint lyfetymes allendarlie of
 “ the said two Countesses of Cassillis and Roxburghe together, the
 “ said Lady Jean Ker shall be secluded, and her liferent-infetment
 “ shall be suspended, in so far as concerns the foresaids lands of
 “ West Sprouston and teinds thereof, and als many of the rents
 “ and lands of Broxmouth and Pinkertons, and other lands and
 “ teinds, lying within the said parochin of Dunbar, in her option
 “ always what part of the saids lands and teins within the said
 “ parochin of Dunbar she shall be secludit fra, as will extend to
 “ 5000 merks yearlie during the space of the foresaid suspension:
 “ with this provision always, that there being a son of this present
 “ marriage, or that any of the saids uther three sisters above
 “ namit shall be Countess of Roxburghe, as said is, that then and in
 “ that case, the said Lady Jean shall be secluded from her lyferent
 “ of the said lands and teinds of West Sprouston, in ather of the
 “ saids cases, als well after the deceis of both the saids Countesses
 “ of Cassillis and Roxburghe as during their lyfetymes; so that the
 “ said Ladie Jean shall have no right nor possession of the saids
 “ lands and teinds of West Sprouston, if ather there shall be a son
 “ of the said marriage, or if any of the rest of her said three
 “ sisters shall be Countess of Roxburghe by marriage as said is.”

My Lords, I presume to notice to you these passages, that it
 may be seen that we have not forgotten what was the course of
 the argument founded upon this contract of marriage. It was
 reasoned upon as furnishing this inference, (and I here take leave

to observe, that the counsel on both sides have found it extremely difficult to restrain themselves within the boundaries of those principles of law which have been laid down, that you are not to construe one deed by another;) but it has, in point of fact, been reasoned, that this is an instrument which tends to shew, that in this year 1655, when this contract of marriage was entered into, the parties to this contract of marriage did not entertain any notion that the three younger sisters could be Countesses of Roxburghe, except by marriage; from which it has been inferred, that therefore they could not be Countesses of Roxburghe by the effect of that limitation to the eldest daughter and their heirs-male, which is contained in the deed of 1648. Now, to be sure, it would have been very easy, if you had set about executing a marriage-contract like this of 1655, with reference to every event that might have happened, to have provided for every such event. Lady Jean Ker, your Lordships recollect, (and when one is to consider what belongs to an argument founded upon the notion, that these four daughters were the *dilectæ personæ*, it is worthy of observation, that Lady Jane Ker,) when she married Sir William Drummond, was not herself, if I understand this instrument of 1648, to be considered as owner of the estate, but Sir William Drummond was to be considered as owner of the estate; and if Lady Jean Ker had died, Sir William Drummond would still have continued owner of the estate, with respect to himself and the heirs-male of his body. But put the case the other way; suppose Lady Jean Ker had married Sir William Drummond, and Sir William Drummond had died without heirs of the marriage, does it appear to have been of necessity, that any of the three others, by marrying the other parties, whose connection with them in marriage was looked to, would have been Countesses of Roxburghe? For unless there was some objection in point of consanguinity known to the Scotch law, which I am not at present aware of, but which there might be; unless it is an absolute certainty, that no Scotch Lady likes a second husband; I have no idea that Lady Jean might not have another husband in a Fleming, and be Countess of Roxburghe by reason of that second marriage, as well as by the first. If the Flemings were so connected with her in consanguinity, that they could not be connected with her after her first marriage, the contrary of that is true.

There is another observation which has been made, that because the author of this deed thought the other three could be Countesses of Roxburghe only by marriage, they, *ex necessitate*, thought they could be such only by marriage with the Flemings; but there is also a clause in the deed as to the marrying some other person of lawful and honourable descent. There is a third observation to be made upon this deed, that if you can look at it as evidence, it is but evidence; and looking at it as evidence, being but evidence, it amounts to nothing more than the construction which the individual parties to this deed may be said to have put upon the charter of 1648; and they thought it possible that one of those other persons might become Countesses of Roxburghe;— they thought it, in the first place, likely the Flemings might not disregard the invitation to a matrimonial connection, which this deed of 1648 held out to them; and they did not look at all the events, or through all the contingencies that might happen, to which the deed of 1648 might apply. If it can be admitted as evidence, it is an instrument which your Lordships undoubtedly, in that view of the subject, ought to consider when you take a full view of the whole subject before you; and it is for that reason I have taken the liberty to call your Lordships attention thus particularly to it.

My Lords, There was another parliamentary ratification, which your Lordships will recollect followed this deed of nomination in 1648, which I think was procured in the year 1661; and it is material also to take notice of another deed, which was a deed of ratification by Sir Walter Ker of Fawdonside, who had at that time become the heir-male of the Kers of Cessfurd, and consequently heir under the ancient investiture. That parliamentary ratification, and that ratification by Sir Walter Ker, will be more material to be considered certainly in the question upon the dignities, than they are with reference to the contest relative to the estates.

My Lords, This William second Earl of Roxburghe had two sons by his marriage with Lady Jean Ker; Robert, who succeeded him in 1665, and John, who was afterwards Lord Bellenden. Robert, the third Earl of Roxburghe, is stated to have been succeeded by his sons Robert and John, fourth and fifth Earls of Roxburghe; and all these heirs of entail are stated to have completed their feudal titles to the estates, in the terms of the deed of 1648.

In 1707 John, who was the fifth Earl of Roxburghe, obtained a patent from the then Queen (Queen Anne), which your Lordships have printed at length in the Appendix to Colonel Walter Ker's case. It is No. 13 in that Appendix; and by that deed Her Majesty states, "*Facimus, constituimus, creamus, et inauguramus, eundem Joannem Comitem de Roxburghe, Ducem de Roxburghe, Marchionem de Beaumont et Cessfurd, Comitem de Kelso, Vicecomitem de Broxmouth, et Dominum Ker de Cessfurd et Cavertoun; dando, concedendo, et conferendo, sicuti nos, per præsentes, damus, concedimus, et conferimus, in dict. Joannem Comitem de Roxburghe, ejusque hæredes masculos de suo corpore, quibus deficientibus, aliquos hæredes, titulo et dignitate Comites de Roxburghe, per priora diplomata prædecessoribus dict. Joannis Comitis de Roxburghe eatenus fact. et concess. succedere destinat. dictum titulum, honorem, ordinem, gradum, et dignitatem Ducis.*" So that these honours were given to him and the heirs-male of his body, with remainder to the heirs of the title to the Earldom of Roxburghe; and without going further in matter of observation as to the dignities at present upon this instrument of 1707, I would just observe to your Lordships, that if it can be made out that the deed of 1648 did not pass the dignities, or if it can be made out that if the deed of 1648 was intended to pass the dignities, yet by reason of the mode and manner in which the charter was executed, I mean with reference to the sign-manual and the cachet, it did not pass the dignity of Earl of Roxburghe; or if it can be made out, that supposing that deed was not effectual to pass the dignity of Earl of Roxburghe, the parliamentary and other ratifications of this charter are upon any grounds not sufficient to give validity to the charter of 1648; it will fall to be considered, with reference to this patent of 1707, upon whom the titles granted by the patent of 1707 will actually devolve, not with reference merely to the intention of Her Majesty who granted those letters patent of 1707, but with regard to the question of law and fact, who is at this moment entitled to the Earldom of Roxburghe?

My Lords, in the year 1729 John the first Duke of Roxburghe executed a disposition of his estates. He proceeds, in that disposition, upon the narrative of the deed of nomination and the entail of 1648; and he disposes these estates to Robert Marquis of

Beaumont, his only son, and the heirs-male lawfully to be procreated of his body; which failing, to the other heirs of tailzie substituted to them, contained in the tailzie made by the deceased Earl of Roxburghe, his great grandfather's father, and in his infeftments thereupon, *all which heirs of tailzie are held as therein insert and expressed*; which failing, to him, his heirs, and assignees whatsoever. My Lords, I do not at this moment correctly recollect whether, in that charter of 1729, when the eldest daughter of Hary Lord Ker is mentioned, she is mentioned with the addition of *her* heirs-male.

In 1740 the Duke of Roxburghe executed another deed of entail of certain lands, but in like manner, and they are disposed
 “ to his son Robert Marquis of Beaumont, and the other heirs-
 “ male of his own body, and to his brother-german Lieutenant
 “ General William Ker, and the heirs-male of his body; whom
 “ failing, to the other heirs of tailzie substituted to them, con-
 “ tained in the said entail of the said estate of Roxburghe, made
 “ and granted by the said deceased Earl, his great grandfather's
 “ father, and in the infeftments following thereupon, *all which*
 “ *heirs of tailzie are held as herein insert and expressed.*” And
 here, without answering for a correct memory upon the subject,
 your Lordships will be pleased to suppose (be the fact as it may)
 that the limitation is to the eldest daughter of Hary Lord Ker,
 and her heirs-male.

In 1741 Robert, second Duke of Roxburghe, succeeded to his father, and he is stated to have completed his investiture (I am now stating from the Case of Colonel Walter Ker), by executing the procuratories contained in the two last-mentioned deeds, and by virtue of this it is represented that he expedited a charter from the Crown in favour of the heirs named in the entail of 1648. The clause in this charter contained in the substitution in favour of the eldest daughter of Hary Lord Ker is conceived in the following terms:—“ Et quibus omnibus deficien. per decessum,
 “ aut per non observantiam, seu præstationem, restrictionum et
 “ conditionum supra script. jus dict. status et patrimonii per dict.
 “ literas talliæ declaratur, cadere, devolvere, et pertinere ad filiam
 “ natu maximam quondam Henrici Domini Ker, filii Roberti
 “ primi Comitis de Roxburghe, absque divisione, et ad *ejus*
 “ *hæredes* masculos, illa omni modo obligata nubere, seu nupta

“ esse, generoso viro præclari et legitimi stemmatis, qui omnes
 “ conditiones suprascript. perimplebit; quibus omnibus deficientibus, ad præfati quondam Roberti primi Comitis de Roxburghe
 “ propinquiores et legitimos hæredes masculos quoscunque, et per
 “ præsentés providetur et declaratur, quod eadem iis cadent et
 “ devolvent conformiter.”

In the year 1747 Robert, the second Duke of Roxburghe, executed another entail of his whole estates; and in this deed the lands contained in the charter of 1741 are disposed by the Duke, with a reservation of his own liferent right, “ to John Marquis of
 “ Beaumont, his eldest son, and the heirs-male of his body; which
 “ failing, to the other heirs-male of his own body; which failing,
 “ to the other heirs of tailzie substitute to them by the nomination,
 “ designation, and tailzie made and granted by the deceased
 “ Robert Earl of Roxburghe, my great grandfather’s grandfather,
 “ bearing date the 23d of February 1648 years, and by the infeftments following thereupon (*all which heirs of tailzie are held as
 “ herein insert and expressed*); which all failing to me, my heirs,
 “ and assignees whatsoever.” Then, my Lords, follows this clause, which calls for your Lordships particular attention: — “ And
 “ failing of them all by death, or not observing of the provisions,
 “ conditions, and restrictions above written, the right of the said
 “ estate was by the said tailzie declared to fall, pertain, and belong
 “ to the eldest daughter of Henry Lord Ker, son to the said
 “ deceased Robert Earl of Roxburghe, without division, *and to
 “ her heirs-male*, she always marrying or being married to a
 “ gentleman of honorable and lawful descent, who shall perform
 “ the conditions above written; which all failing, and their said
 “ heirs-male, to the said deceased Robert Earl of Roxburghe his
 “ nearest and lawful heirs-male whatsoever; and it is hereby provided and declared that the same shall fall and devolve to them
 “ accordingly.”

My Lords, I have troubled your Lordships by stating with so much of particularity and detail these last charters, concluding with this of 1747, under which a feudal title was made up by special service and infeftment, I think, by John the third Duke of Roxburghe, for the purpose of drawing your Lordships attention to what has been contended in some degree in the Court below, perhaps in a greater degree than I am aware of from the informa-

tion I have received from the papers,—to what has been contended also at your Lordships Bar,—that you are to look at this charter as the present investiture of the estate; and it is therefore argued that whatever was the effect of the charter of 1648, if the charter of 1648 properly construed, gave to all the daughters *seriatim*, or in any other way in which all the daughters could take, and their heirs-male, whatever those words mean, could take; yet this charter limiting to the eldest daughter and her heirs-male the effect of this charter, and the subsequent possession, is to oust the title altogether of the three younger daughters and their heirs-male, whether these words “heirs-male” are to be taken to mean heirs-male of the body, or heirs-male generally. My Lords, I shall offer to your Lordships my humble judgment that it is impossible to maintain that. The intention of the author of this charter, and all these charters, appears to me to have been declared in the body of the charters to be, not to alter the destination of the entails. There is an express declaration in each and every of them: it is enough that there is an express declaration in the last of them, that all the heirs of tailzie of the deed of 1648 are to be taken as if they were therein inserted. There is therefore an express declaration upon the face of each instrument itself, that it was not the intention of the author of it that the eldest daughter should take in any other way under those instruments, or that any other interpretation was to be given by them to the charter of 1648 than what belonged to the charter of 1648. I have a considerable inclination of opinion, that if, instead of the plural term “*their*” (although a very weighty term) in the charter of 1648, the singular term “*her*” had been inserted, it might have been so inserted without considerable prejudice to what I shall submit to your Lordships is the true meaning of that deed. I am perfectly clear, that this charter of 1747 (and so of the others), referring thus to the charter of 1648, does in effect maintain it; and though in general you cannot construe one deed by another, yet where one thus expressly refers to another, the other is, as it were, incorporated into it, by the effect of that express reference, and the deed here professing to treat all the heirs of tailzie in the deed of 1648, as if they were therein inserted, you must construe the expressions in the deed of 1747, and in these intermediate instruments between 1648 and 1747, by reference to the charter of 1648. I do not mean to deny, that if you can

look at these charters as evidence (if they can be said to carry about with them the legitimate character of testimony as to the meaning of another deed), they may not be said to amount to some testimony, that you are not to give a plural interpretation to this term in the charter of 1648; but if notwithstanding you shall give them the character of legitimate testimony, you are authorised and required, upon the whole matter, to say that the legitimate meaning of the deed of 1648, in the clause in question, is to embrace a plurality of persons, in that case it appears to me that it is impossible to say, that by the effect of this subsequent charter and the possession, the right of these heirs of tailzie is destroyed, who are to be taken as insert in this subsequent charter. I shall certainly trouble your Lordships no further in what I have to offer to your consideration upon this point.

My Lords, I understand the third Duke of Roxburghe died without issue in March 1804, and upon his death, and the consequent failure of the male line of Robert the third Earl of Roxburghe, the succession opened to William Lord Bellenden, the grandson of John Lord Bellenden, second son of William second Earl of Roxburghe, and only remaining male descendant of the marriage between Earl William, formerly Sir William Drummond, and Lady Jean Ker, the eldest daughter of Hary Lord Ker. It has been stated to your Lordships as matter of fact, that the line of Fleming had for a considerable time been extinct.

This last Duke of Roxburghe executed several instruments (the particular nature of which I do not trouble your Lordships with stating at this moment) previous to his death, which happened on the 22d of October 1805, and which are the instruments aimed at in the actions of reduction. By these instruments, different in their nature and contents,—under the effect of these instruments, Mr. Bellenden Ker (who appears to be a relation of this very honourable family) and trustees named by the Duke claimed the estates.

My Lords, after the death of the Duke of Roxburghe, Colonel Walter Ker, who conceived himself to be entitled, by the failure of the prior substitutes, (and I would here put your Lordships, in a short word, in mind, that Colonel Walter Ker insists, that Lady Jane Ker was the only daughter who took under the clause I have so often referred to; and that he farther insists, that the heirs-male of Lady Jane Ker, who are called under that limitation, are heirs-

male general,) proposed to enter into possession of the estate as heir of tailzie; and his intention being resisted, the papers represent to your Lordships, that a petition was presented to the Sheriff-depute of Roxburghshire, for the purpose of obtaining judicial authority to enforce his claim; and to this petition answers were put in on the part of Mr. Bellenden Ker and the trustees. Whilst these proceedings were going on before the Sheriff, and as it has been represented, before he had pronounced a judgment, a petition was presented to the Court of Session by Sir James Norcliffe Innes, in which he stated, that he was the heir-male of the body of his great-grandmother Lady Margaret, the third daughter of Hary Lord Ker; that he was in that character entitled to succeed to the honours and the estates of the family; and he founded his title on the clause of destination in the entail of 1648, in favour of the heirs-male of the eldest daughter of Hary Lord Ker, under his sense of these words, "eldest daughter," &c.; he called upon the Court to award sequestration of the estate till there should be an end of the competition; and, after an answer put in by Mr. Bellenden Ker and the trustees, the proceedings before the Sheriff having been removed into the Court of Session, interlocutors were pronounced, which sequestered the estates in the hands of the Court, and appointed a judicial factor to manage them—an officer, I presume, in the nature of a receiver in other courts of equity, to manage the estates, and receive the rents, for the purpose of handing over the rents and profits of the estates, collected in the mean time, to that hand which *ab initio* should be declared to have been entitled. Appeals have been entered by both parties against this interlocutor and against this sequestration.

My Lords, Besides these proceedings, Colonel Ker took the usual measures for obtaining a service as heir of tailzie to the late Duke of Roxburghe, having purchased, as your Lordships know he must do, brieves from His Majesty's Chancery in Scotland, directed to certain officers, known by the name of the Macers of the Court of Session, for serving him the nearest and lawful heir of tailzie and provision in special to William Ker, the last Duke of Roxburghe. Sir James Innes also purchased brieves for serving himself heir of tailzie and provision; and, in consequence of that, a proceeding took place in the Court of Session in Scotland, which I understand to be usually denominated a competition of brieves.

The other proceedings, which are usual in cases of this nature, then took place. The Court of Session appointed, as Assessors to the Macers, four of their own number, thereby giving to the Macers the most respectable assistance they could receive. In this competition between Colonel Walter Ker on the one hand, and Sir James Innes on the other, Mr. Bellenden Ker and the trustees interposed, and insisted to have a title and interest to be heard as parties in the services. They qualified their title and interest, as I understand it, thus: They said, that they had infestments or deeds which gave them a title to the possession of, and interests in the estates, the title to the inheritance of which was in question between the two competitors in these proceedings: And if Mr. Bellenden Ker and the trustees could make out, either that neither of these gentlemen were heirs of tailzie, or that one of them might be, and the other was not; they had an interest, in the *first* place, to displace them both, because then they might have nobody to contend with in the actions of reduction; or they had an interest to displace one or other of them, because then they would not have so many persons to contend with in the actions of reduction: And the Court of Session were of opinion, as your Lordships will find, by an interlocutor, which is likewise the subject of appeal, that Mr. John Bellenden Ker, Mr. Henry Gawler, and Mr. John Seton Karr, had a title to appear in the services of Brigadier General Ker and Sir James Norcliffe Innes, and to be heard for their interest. My Lords, There is a second interlocutor which asserts the same thing, that they have a title to appear; and finds also, that the points of law, with respect to the construction of the tailzie and settlements of the estate of Roxburghe, must in the first place be determined; and they recommended to the Macers, with their Assistants, to hear counsel for the parties, and to proceed otherwise in the cause as to them should seem proper.

My Lords, Upon this proceeding your Lordships will permit me to repeat the observation which fell from one of your Lordships as well as from myself, that it appeared to us, who are not so habitually sitting in a Court of Session as the Learned Judges below, to be a very singular species of proceeding; that it was a proceeding for which there was no analogy in the Courts in England; because, without establishing that these deeds of Mr. John Bellenden Ker were good; without establishing that Colonel Walter Ker was the respectable individual in point of family whom he

represents himself to be; without establishing that Sir James Innes Ker was the respectable individual in point of family whom he represents himself to be; the Court proceeds to give a judicial opinion upon the points of law, though it might turn out that not one of the parties before them had any right whatever to call upon them for it; and this has struck your Lordships, I know, very much in the case of the Peerages, so much so, that I protest I do not know at this moment how to get over it, as a thing quite inconsistent with all our judicial usages and habits, to come to a determination upon a point of law, till we are quite sure, that, in fact, we have some persons before us, who have a right to call for that judicial opinion; and it would certainly be a singular transaction in any court of justice, if, after having declared doctrinal matter in point of law, when you go to try the facts, it would turn out that none of the individuals before you had any right to call for your opinion in point of doctrine; and if you should ultimately happen to have before you hereafter other persons really interested in the question, who should be able to persuade you that your present law was wrong, and to prevail upon you to reverse, as between proper parties, those legal adjudications which you had perhaps been led to form, because you came to them in the absence of the parties really interested in duly laying the case before your Lordships. I mean this as general observation only. I do not mean to say, that it will apply to the conduct of the parties in the case before your Lordships. I am persuaded that some one or other of them have the interest or character here assumed, and that they really have given your Lordships as much information as ever was given in any case, and the fullest possible information, I believe, which can be given upon this case.

My Lords, While these competitions were thus depending, actions of reduction, improbation, and declarator were severally brought, at the instance of Sir James Innes Ker, and also, as I understand, of Colonel Walter Ker, for annulling the conveyances granted by the late Duke of Roxburghe to Mr. Bellenden Ker, and to his Grace's trustees, and on the 13th, (though signed on the 15th) of January 1807,* the Court of Session pronounced this interlocutor,

* This judgment having been appealed, the Court of Session, (10th July 1807) in respect of the said appeal, remitted to the macers, with instructions that they suspend in *hoc statu* further proceedings in the said service.

“ find that the Estates of Roxburghe were held by the late William “ Duke of Roxburghe under an entail, which contains an effectual “ prohibition against altering the order of succession.” There your Lordships also perceive, that you have a judicial declaration, which, if it should happen to turn out, that the Court of Session had not, and that your Lordships have not, upon the appeal respecting the estates, persons before you, who, being able to prove their propinquity, would have a right to contest, in these actions of reduction, with Mr. Bellenden Ker, in the result of the matter it might stand thus, that here might be a declaration upon record against Mr. Bellenden Ker, at the suit of persons who, in such event, might turn out to have no right at all to call for any such reduction; and I mark the circumstance, because, however we may deal with it, it is right that at least it should appear our attention was called to it.

My Lords, There is another passage in the interlocutor of the 15th of January 1807, “and find that the persons called to the succession under that branch of the destination, beginning with the “ eldest daughter of Hary Lord Ker, are heirs of tailzie under the “ said entail.” My Lords, If they were not heirs of tailzie under the entail, it has been intimated to your Lordships in argument, that they could have no title to reduce the deeds, which had been granted to Mr. Bellenden Ker and the trustees; that their briefes being sued out of Chancery for the purpose of having themselves declared to be heirs of tailzie under that entail, it was convenient, and it has been stated to be not only convenient, but, according to the usage of the Court of Session, to come to a decision upon such a point of law before they give the parties the trouble, or expose them to the necessity of proving their propinquity; because if they called upon them first to undergo that necessity and that expence, and if, after all, they should be of opinion that neither of them were heirs of tailzie upon the construction of the clause, which each of them insists is the clause which furnishes the question of construction in that case, after proving their propinquity, upon reading that clause, it might turn out that they had given the trouble, and subjected to the expence of trying the question of propinquity, persons, with reference to whom it was quite immaterial what was the decision upon it. That question, however, whether they are heirs of tailzie, as a preliminary question of law, stands upon quite a different footing, or, at least, may be repre-

sented to stand upon a different footing from the other questions of law embodied in the first finding of these interlocutors; for it is one thing to say, that the Court has determined (Mr. Bellenden Ker standing here), that those persons shall make out that the persons called to the succession in the clause in question are heirs of tailzie, before they establish their propinquity, as they allege it, and another thing to say, *a priori*, that there is a doctrine of law, which will cut down Mr. Ker's deeds; when it may turn out, that in the question of the propinquity of these gentlemen (supposing persons called to be heirs of tailzie) the propinquity of neither might be proved, and in that case no application against Mr. Bellenden Ker could be made at their instance, of the doctrine of law which would be found in the first part of this interlocutor.

My Lords, This interlocutor, consisting of these two parts, was again brought before the Court of Session; and they affirmed the interlocutor, in their language, they adhered to their interlocutor, by another of the 23d of June, 1807.

In the competition of briefes, the case was reported to the Court of Session; and the Court directed the parties to argue it in memorials. It resolved itself into two questions. The first occurred between the appellants and respondents, upon the construction of the entail. The appellants contended, That under the second clause of destination in all the investitures (by the second clause is meant that clause respecting the eldest daughter and their heirs-male), the succession had devolved on the heir-male general of Lady Jean Ker, the eldest daughter of Hary Lord Ker; the respondents, That under the same clause, it had devolved on the heir-male of the body of Lady Margaret Ker, his third daughter. As I had occasion to state to your Lordships yesterday, Mr. Bellenden Ker insisted with Colonel Walter Ker, that the only daughter described in this destination was the eldest daughter; but he disagreed, and necessarily disagreed, with Colonel Walter Ker, in the idea, that the term heirs-male meant the heirs-male generally; because, if the eldest daughter was called, with her heirs-male generally, then Colonel Walter Ker, stating himself to be the heir-male generally, would have a right to succeed, if he can make out that character: therefore Mr. Bellenden Ker contended, that heirs-male did not mean heirs-male general, but heirs-male of her body; and that of consequence, therefore, if the eldest daughter and the heirs-male of her body only were heirs of tailzie, and there was a

failure of those heirs-male, the entail had opened to the clause which, as he insisted, gave the late Duke of Roxburghe a title to make such deeds as those under which Mr. Bellenden Ker claimed.

My Lords, On the 6th and 10th of March 1807, the Court of Session were pleased to pronounce this interlocutor: "The Lords
" having advised the mutual memorials given in by the parties in
" this cause, in obedience to the interlocutor of the 18th day of
" February 1806, writings produced, and having heard counsel for
" the parties in their own presence; they remit to the Macers, with
" this instruction, that they prefer the claimant Sir James Norcliffe
" Innes, heir-male of the body of Lady Margaret Ker, in the fore-
" said competition of brieves relative to the estates and honours of
" the family of Roxburghe; and to dismiss the brieve at the instance
" of Brigadier-General Ker."

Your Lordships will not be surprised that a reclaiming petition was presented against this interlocutor; because, if the Court of Session were right in supposing, that the destination included Margaret the third daughter, and the Court of Session were right in supposing that the term heirs-male meant heirs-male of the body, this interlocutor assumes in its terms, without any proof whatever, that Sir James Norcliffe Innes is heir-male of the body, and therefore prefers the claim of Sir James Norcliffe Innes, as heir-male of the body of Lady Margaret Ker; and having done this, without proof of his sustaining the character of heir-male of Lady Margaret Ker, they go on to dismiss the brieve at the instance of Brigadier-General Ker. Upon reconsidering that interlocutor, they pronounced a second, upon the 7th and 8th of July 1807, in these words: "That they prefer the heir-male of the body of Lady
" Margaret Ker, in the foresaid competition of brieves relative to
" the estates of the family of Roxburghe, on his proving his propinquity; and in that event," (not absolutely, as in the former interlocutor,) "and, in that event, to dismiss the brieve at the
" instance of Brigadier-General Ker; and, with these explanations,
" they refuse the desire of the petition, and adhere to the interlocutor reclaimed against."

My Lords, With respect to the language of this interlocutor, I do not mean the substance of it, that is another way of viewing the case, they prefer the heir-male of the body of Lady Margaret Ker, on his proving his propinquity. Whom do they mean by that? Is

it Sir James Innes, asserting himself to be the heir-male of the body? Or is this a declaration, intended to convey this as a doctrine of law, that if it turns out that nobody before them is heir-male of the body of Lady Margaret Ker, yet that this shall be an assertion in judgment for the benefit of any body who may in future time come before them, making himself out to be heir-male of the body of Lady Margaret Ker. With my very great respect for that Court, with reference to whom I cannot help saying, that I never saw a body of judicial men who appeared to be more earnest in their attention to a subject than they have been to this; and therefore, with the most respectful deference to them, I cannot help saying, that if this is a just doctrine of law, I entertain a doubt whether that doctrine of law is rightly expressed in all the circumstances of this case; and whether they should not have said, that they preferred the claim of Sir James Innes Ker, if he made himself out, by proof of propinquity, to be the heir-male of the body of Lady Margaret Ker; and that the heirs-male of the bodies of her elder sisters had failed. That, however, is a small observation upon the interlocutor. At the same time, I mention it, as I am desirous not to omit any thing that occurred to me in the course of the hearing of this cause.

My Lords, Having stated to your Lordships my humble opinion with respect to the effect of the charter of 1747, and the subsequent possession, as founding the title upon prescription, connected with that charter, your Lordships will permit me to mention, what I have passed over in the historical account of these transactions, and which certainly I ought to have called your Lordships attention to, I mean the instrument of release and renunciation on the part of Lady Margaret Ker, I think upon her marriage, which has been contended at your Lordships Bar to be an instrument effectual to put an end to her claim altogether, if she had a claim under the deed of 1648. My Lords, If the true meaning of the deed of 1648 be that which Sir James Innes Ker has contended for, it appears to me, and I state it without any hesitation or difficulty to your Lordships, to be impossible to set up that instrument as a bar to the claim of these estates. It must operate to the extent in which it was intended it should operate; and in any view of the subject, as it appears to me, it never can be set up as an instrument effectual as a plea in bar to the present claim.

Having given your Lordships my opinion upon that, before I enter more particularly upon the consideration of the meaning of the clause, "eldest daughter, and their heirs-male," there is another point upon which it is necessary that I should, with your Lordships leave, express the opinion which I entertain upon it; because it is a point which must be disposed of before we can very well agitate usefully, I mean the question, Whether the persons who claim under that destination are or are not heirs of tailzie? And *assuming* for the moment (your Lordships will be kind enough to mark the words), *assuming* for the moment, that all the rights of the heirs of tailzie are guarded by clauses irritant, resolute, and prohibitory, sufficient to prevent an alteration of the order of succession, upon the point, Whether the persons named in that destination are such heirs of tailzie as are entitled to the benefit of those clauses so understood to prohibit alteration of succession? My Lords, The opinion which I have formed, has been an opinion which I can venture to represent to your Lordships as having undergone no change (I do not say it is one bit the better for that); but as having undergone no change from the first moment that I read this instrument. I take it to be immaterial, to what part of a settlement or disposition of this nature, in what order or manner, except as to the priority of taking as heirs of tailzie, that persons described are inserted. I take it, that the true question is, upon the whole matter and contents of the deed, Whether the individuals named in a part of it, are meant and intended to have the same benefit of the clauses, provisions, conditions, and restrictions, which, it appears clear upon the face of the instrument, the persons mentioned in other parts of the instrument are designed to have? and the question, Whether these persons are heirs of tailzie? depends entirely, in my humble judgment, upon the question, Whether the estate was meant to be protected with the same anxiety expressed in the same clauses, or by reference to the same clauses, as the estates given to Drummonds and Flemings marrying the daughter of Hary Lord Ker? It appears to me to be sufficient to say, "Read the deed;" read it over and over again; and that is the conclusion to which you will come, in my humble judgment,—that is most undoubtedly the conclusion I have come to, that they are heirs of tailzie,—that the eldest daughter and her heirs-male whatever is meant by that expression, whether it is an expression

describing her only, and describing her heirs-male generally, or heirs-male of the body;—in the one case, she and her heirs-male are heirs of tailzie, in the other, she and the heirs-male of her body are such:—that if, on the other hand, it is meant to describe all the daughters *seriatim*, and their heirs-male generally, if that be the import of the word, or the heirs-male of their bodies, if that be the construction of the words, all the daughters and their heirs-male, as those words are to be understood, are heirs of tailzie.

My Lords, If you shall be disposed to adopt that reasoning, we come next to consider, who is that heir? or who are those heirs of tailzie that are mentioned in this clause of destination? and it becomes necessary for me here to read that clause once more to your Lordships. But before I do so, I wish, if your Lordships would permit me, to request you always to recollect, that when you are construing such a clause as this, you are applying yourselves to the determination of a question which may depend upon principles entirely different from those which would belong to the consideration of the question, if it was a pure dry destination to heirs-male, or a pure dry destination to A, and his heirs-male, without more: That you are applying yourselves to the consideration of a question which arises upon terms quite different, both in common parlance and in legal language, from those I have last mentioned, which arises, not out of a pure short dry limitation, described in strict legal terms, connected with an unquestionable designation of an individual, and an individual only, but that you are applying yourselves to the consideration of the question which arises upon a clause, consisting of a great many expressions, a great many obscure expressions, and a great many expressions which consist of terms unquestionably flexible, which consist of terms flexible in common parlance, flexible in those instances which may be produced from the language of the law: That in such a case, therefore, your Lordships are to put the whole together; you are to see what belongs to each and every part of the terms used, and you are not to decide what would belong to any particular part, if it stood by itself unconnected with the rest; but you are to decide upon what is the meaning of each word, regard and reference being had to all the context; and I venture to go the length of saying, that if there has been any where an opinion that this clause cannot be construed but with reference to the words which form the clause itself, I venture humbly so far to

differ from that, as to say, I apprehend it may at least be construed with reference to every thing to be found within the four corners of that deed in which the clause is found.

My Lords, Having stated this, your Lordships will be pleased to allow me to read this clause once more: " And qlkis all failzeing
" be decease or be not observing of the provisions restrictions
" and conditions above written The right of the said estate sall
" pertain and belong to the eldest dochter of the said umq^l Hary
" Lord Ker without division and y^r aires-male she always maring
" or being married to ane gentilman of honour^l and lawful descent
" wha sall perform the conditions above and under written qlkis
" all failzing and y^r sds airis-male to our nearest and lawful airis-
" male qtsomever."

My Lords, The first expression which occurs here is the " eldest daughter," and there can be no doubt, that, generally speaking, we should say, that was a destination to an individual; it is impossible to deny, that in the former part of this deed, where Lady Jean Ker is mentioned as the eldest daughter of Hary Lord Ker, it was so applied; it is impossible to deny that:—But, my Lords, on the other hand, you must consider, that the words " the eldest daughter" may admit of a very different construction, according as the context may require, or as the whole words of the deed may require. Take it, for instance, as it stands in our own law: I need not point out to your Lordships what the expression " younger children" *may* mean. I need not point out to your Lordships what the first born son of a person *may* mean with reference to the context. I need not point out how often your Lordships are driven, by the context, and by the different parts of the instrument, to say that a person is the eldest son who is not the eldest born son; and these words, " the eldest daughter," may at least admit of all these differences of exposition, and perhaps many more: Eldest born,—eldest at the date of the settlement,—eldest at the death of the author of the settlement,—eldest at the time the succession opens,—or the eldest according to the series in which they are brought up, the third to be the second, or the second to be the first.

My Lords, I am very ready to admit, that if there had been this sort of destination in the deed, " to the eldest daughter and her
" heirs-male, with remainder to the youngest daughter and her
" heirs-male," I should not have known how, by any construction,

to have brought in by argument and inference the second and the third daughter, and their heirs-male; and supposing there had been a limitation to the youngest daughter, it would have been a very difficult thing, I do not say altogether impossible, upon the context of the deed, to make the youngest a general term, sufficient to describe the daughter becoming from time to time the youngest. I think I could draw a deed upon my own conception of such a thing as that, to give the words "youngest daughter" that effect; but it cannot be said generally they would have that effect: on the contrary, they would in general have no such effect. So as to the words "second son," it is quite familiar to an English lawyer, and it seems to be so to the Scotch conveyancers, that he may be the second born son, or he may be the son who, being the third born, becomes the second within the meaning of that instrument: so that it is the context, contents, and plan of the deed that always decide it.

The next phrase that occurs is, "eldest daughter of the said Hary Lord Ker without division." Now, upon the words "without division" I lay no further stress than this, that they are to have such an effect given to them as is due to them, being found in this place, and in this context, and in this deed; and I do admit, that the words "without division" being used, because it has been proved that they have in point of fact been used in this very case, without our being therefore entitled to say that a plurality of persons was intended by singular words, where the words "without division" are applied; yet it must be admitted, on the other hand, that the words "without division" are words familiarly used with reference to a singular term, plural and collective in its meaning, as heir-female, for instance; and therefore the true way of considering these words "without division," is neither to give them too much meaning in the construction of the sentence, nor too little meaning in the construction of the sentence.

So again, another observation has been made. It is said, if the eldest daughter was meant, the author of this instrument would have said, the "said" eldest daughter. I think by some a great deal too much weight has been given to the want of that word "said," and that a great deal too little has been attributed by others to the want of it. The absence of the word in this clause, which is here to be interpreted, must have some weight.

My Lords, It has likewise been said, and said with some weight, if it had been the intention of the author of this instrument to give this to Lady Jean Ker, why would not he have said Lady Jean Ker? Why does he say the eldest daughter? If the writer was pinched for room in this blank, to be sure the shortest way possible of expressing himself would have been to say, I mean to give this to Lady Jean Ker, and her heirs-male; but if it was meant to give it to Lady Jean Ker and her heirs-male, why use all this circumlocution and involved phrase? His meaning being supposed to be this, having to write within a cramped space, it is wonderful that he should not take the shortest mode of writing, but should adopt the most round-about way of doing it. That is an observation that deserves some weight; but I do not apprehend it deserves all the weight that has been given to it.

My Lords, The next expression we have is a very material one, "*their* heirs male." Now, upon that it has been argued, that the word *their* is an error, and you must read *her*; and it has been argued, unquestionably argued with great effect, that if you will only substitute the word *her* instead of the word *their*, the sentence will all read very well,—that it will then read,—“The right of the said estate sall pertain and belong to the eldest dochter of the said umq! Hary Lord Ker without division and *her* aires-male she always mareing or being married to ane gentilman (not in the plural number) of honour^l and lawful descent who sall perform the conditions above and under written.”—And it is stated very truly, provided we were at liberty, in judicial construction, to act upon such a statement.—You want to correct the antecedent “eldest daughter” by the pronoun “*their*.” Now, say the other side, it is much more reasonable that we should correct the pronoun by the antecedent; and that it is much more reasonable, is evident from this, that the rest of the sentence will then be consistent, if you correct the pronoun by the antecedent “eldest daughter,” for that will agree with the term as to the marriage, “*she* always mareing;” that you can correct the word “*their*” by the words “eldest daughter,” but that you cannot correct the eldest daughter by the word “*their*,” because eldest daughter is exactly the expression it ought to be. So again, as to the singular expression “a gentilman,” that if you do not correct the pronoun “*their*” by the words “eldest daughter,” and by the subsequent

expression "*she*," instead of these words "ane gentleman of "honourable and lawful descent," you must read it "so many "gentlemen of honourable and lawful descent."—And so, my Lords, it might again be put in another way. Suppose they were to give an interest in an estate to a son and *her* heirs, or to a daughter and *his* heirs, to be sure you will say you must correct the pronoun by the antecedent, and not the antecedent by the pronoun—you will say, it must be a son and his heirs, and in the latter clause, a daughter and her heirs. My Lords, I admit all this, but this is never done but in a case of necessity. You cannot reject a phrase, except where it is absolutely necessary that you should reject it; and you cannot so correct it, unless there is an absolute and indispensable necessity that you should so correct it. If you can give a consistent meaning to the words forming the phraseology of a deed, I say that your Lordships are not at liberty to alter one syllable of it. You must take the deed as it is; you must make a consistent construction of it as it is. If you can make a consistent construction of it as it is, and making a consistent construction of it as it is, if you can give effect to all the words, I say then you are bound, by every judicial rule I ever heard of in my life, to say that the author of a deed meant to use every one word and syllable that he has used. Then, my Lords, I am bound to this, that I cannot suppose there is any mistake,—I dare not suppose it,—my duty will not permit me to suppose it, if I can give a consistent meaning to all the words as they are,—and I dare not suppose that any of these words were written by mistake, if a sensible meaning can be given to the whole of this sentence with the word "*their*" standing a part of it. That is my answer to the suggestion about error, that you cannot lightly infer that there is an error in transcribing a deed, or that you are to read *their* as if it were written *her*. I say, if you are driven to it by necessity, the necessity will justify it; but if it is not necessary, it is the most unjustifiable proceeding which can be taken in judgment.

It is said, however, that it is of necessity, because the word "eldest daughter" is just as much a singular term—is just as descriptive of no more than one individual, as, in the case I have put, of the second son and her heirs, or of the daughter and his heirs, the words son and daughter are. That I deny, because I have stated to your Lordships the different senses which this word

may have in common parlance, and the different meanings it may have in instruments. I say, eldest daughter is an expression which, without the aid of construction drawn from the other parts of this instrument, might be represented perhaps as describing a class of persons; but in a deed where I find singular words describing classes of persons—where I find plural words describing individuals, I refer your Lordships to the clauses about taking the name and arms—to the clauses about the portions—to the small but important observations, as they appear to my mind, which, in passing through the contents of this deed yesterday, I offered to your Lordships attention—when I find plural and singular terms are applied over and over again throughout this deed in the way in which they are, am I at liberty to say, that I am under such a necessity, such an invincible necessity, of considering the words “eldest daughter” as meaning an individual, as to justify me in proceeding by a rule of construction, the last in construing instruments to be adopted—never to be adopted but in the case of inevitable necessity—to suppose that the word “*their*,” which the author of the deed has inserted in the deed, is not the word he meant to have inserted in the deed?—My Lords, I cannot do it.

But then it is said, that the word “*their*” may be considered as applying to different individuals named or described in this very clause; that the word “*their*” may mean, for instance, the heirs of the eldest daughter, and the gentleman of honour whom she shall marry. With respect to this supposition, there are different observations to be made to your Lordships. If the word “*their*” has been properly rendered into either the Latin word “*eorum*” or “*ejus*,” this cannot be the meaning of the word “*their*.”

If the proper translation was “*eorum*,” and the limitation is to the Lady and the husband she shall marry, and their heirs-male, does Colonel Ker with prudence contend for that? If it be so, then what do the words “their heirs-male” mean? Must they not mean in that case, heirs-male of the body, heirs-male of the marriage.—I point out to your Lordships also, the vast change which you must make in the position of words to adopt this construction. But the words “heirs-male” are stated in argument, to apply to Lady Jane Ker, the daughter of Lord Hary Ker, and Hary Lord Ker. It appears to me, however, that the father is named here for no other reason than to identify the daughter; and

that the father should be here named to identify the daughter, when the daughter herself might have been identified, by using her name of Lady Jane Ker, instead of the words "eldest daughter," is not an immaterial circumstance, perhaps, to be attended to in construing the clause. There is another way also of considering this; because there might be different persons in different events, the heirs-male of the one and of the other, and then, who are the heirs-male meant? So that it appears to me next to impossible that the word "their" can be applied in the way in which it has been contended, even though you do not give much effect to the word *earum* occurring in a very early part of the instrument.

My Lords, The clause proceeds thus:—"She always maring
" or being married to ane gentilman of honour and lawful descent,
" who sall perform the conditions above and under written."—
Upon this it is said, that these are singular terms. My Lords, they are singular terms; but they are to be construed consistently with the plural terms occurring before, and the singular expression capable of a plural meaning occurring before—and then the question will be, Whether she, that is, the eldest daughter for the time being, or the eldest daughter *de tempore in tempus* coming in by substitution, is not to be taken as meant. I take it therefore, my Lords, the true question upon this is, Are you not to take every word here as the word intended to be used by the author of the deed? If you are to take every word here as the word intended to be used by the author of the deed, the question then is, Are you not at liberty to construe the words of the clause? It is impossible to say that this clause is a clause composed of terms each and every of them having a meaning which, by the law, you are bound to attribute to them. My Lords, I do not mean to say by that, that when you find out what the meaning of each and every of the terms used is, you are not bound to attribute that meaning to them; you certainly are bound to attribute that meaning to them; but you are not in this state that you must say, whatever may be the persuasion of your own mind as to the meaning of each of these words, the law has put an inflexible construction upon these words. It is a very different question as to the construction of the words "heirs-male." It cannot be said, with reference to this branch of the argument, that the law has put a construction upon the words of this clause, which prevents you from putting

upon them the construction which you are convinced is their real meaning. Besides that, if they have no fixed meaning, neither have they an obvious meaning ; for taking the words as they stand, if I may be permitted to use such an expression in this place, they are nonsense. They are words, however, of which, by construction, you must make sense, out of which, by construction, you must create a meaning ; and you must make sense of the words as they stand, if that can be done, for that is the rule of all law. You are driven to construction ; and being driven to construction, I say you are not to construe this clause upon the observation made upon the want of the words " Lady Jean Ker "—upon the observation upon the word " said " alone—upon the observation upon the words " without division " alone—upon the observation upon the words " their heirs-male " alone—upon the observation upon the words " she always marrying " alone—upon the observation upon the words " a gentleman of honourable and lawful descent " alone : But you are to look for the meaning of the words in the aggregate of the observations arising out of each, and every, and all of those words, and putting together the whole of the observations, to say what is most probably the intention of the author of the deed, regard being had to every observation which can be made reasonably upon all and each of the words of the author of the deed. And, my Lords, I go further, and I say, that, in my opinion, you are fully at liberty to look to every part of this deed ; and I say, that elsewhere in this deed you find words which unquestionably create a succession in their legal effect, which, as to their obvious meaning, have not such effect ; but which, in their legal construction, you must hold to create such succession ;—that you find in this deed, in many parts of it, singular terms, yet unquestionably showing themselves, by their context, to have a plural meaning, and to describe classes of persons ;—that you find singular terms unquestionably meaning plural things ;—that you find in this deed plural terms which must necessarily mean individual and singular things. You are to construe this deed, therefore, as the language of the author of the deed, and the language, which, *uno flatu*, the author of the deed has spoken. You must collect from his style and manner of language, taking the whole of it together, what he meant by every part of that instrument which contains his language.

My Lords, I have no inclination to deal with other questions which have been submitted to your attention. It has been said, that your Lordships are not to look at the deed of 1644—this has been said by those by whom, nevertheless, your Lordships have been called upon to look at all the deeds prior to 1643—and by whom your Lordships have been called upon to look at all the procuratories of resignation, and all the charters prior and subsequent to 1648; and if you have been called upon at the Bar, to do that with a view to say, that, because in those other charters the authors of them meant to make particular destinations, therefore they must have meant, in this charter of 1648, to make the same destinations. My Lords, I am ready to admit, that that is a mode of proceeding which I cannot reconcile to any principles of law which I have been taught. It is for that reason I here state to your Lordships that I can give no weight at all to the arguments I have heard from the Bar, that it was not the intention of the author of the deed of 1648 to alter the destination of this deed of 1644. I cannot read the deed of 1644, and the deed of 1648, without seeing that he did mean to alter, in some respects, the destination of his property; and when I apply my mind to the question—did he mean to alter the destination of his property among his grand-daughters, failing the institute and the substitutes? My Lords, I do not look to the deed of 1644 to teach me what he meant to do by the deed of 1648 in this respect. I look at the deed of 1648 to see what he has done in this respect in the deed of 1648; having regard to the whole of that deed, and informing myself no otherwise from the deed of 1644 than I should do from a charter in any other family, that is, looking to it as an instrument to teach me what was the Scotch law-language in deeds of that period.

That the deed of 1644 had some very material passages in it in this view, I think your Lordships could not but observe, when I gave you the detail of it yesterday. I think your Lordships cannot but have observed, that I have given very little, weight too to a great deal of argument we have heard at the Bar, as to the predilection which the author of this deed is supposed to have had for his grand-daughters over the heirs-male general, for the three younger grand-daughters as well as the eldest grand-daughter, and the predilection which he is supposed to have had for the younger grand-daughters over the heirs of any descrip-

tion. My Lords, if you look to the effect of this instrument, all that you can say about it in this respect is, that having provided destinations of his estates to the four daughters of Hary Lord Ker, marrying these favourite persons the institute and substitutes, in the order in which he had so provided for them, it is probable that, if these marriages never took effect at all, he should intend that there should be the same provisions for these daughters, *seriatim*, not marrying an honourably descended Drummond, or an honourably descended Fleming, but a lawfully and honourably descended gentleman of any other name. One cannot imagine why he should have had the fancy of going through this substitution, in case of their marrying those favourite individuals, and why he should not have had the same fancy, to go through the same substitution, if it should turn out, that these gentlemen, the Drummonds and the Flemings, did not find these Ladies to their taste, but left these Ladies to marry other gentlemen of honourable and lawful descent;—why he should mean to exclude his second, and third, and fourth grand-daughters in that case,—it is very difficult to conjecture that that should be his meaning; but, my Lords, if the deed clearly expresses it, you must give effect to it. You cannot fancy for him, you cannot insert destinations he has not inserted; and when you recollect how he has passed over the youngest daughters of some, and the grand-daughters of others, it is impossible to deny that there is a great deal of argument upon matter of probability, to be submitted to your Lordships consideration on both sides.

Then, my Lords, your Lordships have heard it argued, Why can you possibly suppose there are four substitutions in so short a clause as this? My answer is, I can suppose four substitutions in a much shorter clause. If you ask me, Can I suppose, that if there were four substitutions, they would be expressed in this way? My answer to that is, that inexperienced a Scotch Lawyer as I am in conveyancing terms, I think I could have drawn a much better deed than this in reference to this destination. But I think, if your Lordships differ from me in this part of the case, I should be entitled to ask you, on the other hand, Can you suppose, that if the author of this deed meant simply Lady Jean Ker and her heirs-male, he would have used all the words you find there? If that had been my meaning, I would have drawn a much better deed than this is, with a view to effectuate that intention. But, my

Lords, I do not go upon these grounds. Without entering into the question, of how much more, or how much less of weight belongs to all these probable reasonings; without entering into the question, of how much more, or how much less of weight,—whether any, and if any, what degree of weight, is to be given to the prior charters,—the charter of 1644,—to the subsequent charters looked at as evidence;—without reference to the question, Whether, if they can be looked at as evidence, they do more or less establish the propositions which each side has endeavoured to maintain upon them:—My Lords, without entering into any thing but the construction, the best construction that can be made of this instrument of 1648 itself;—attending to every word of that instrument which can furnish a fair argument to say that the eldest daughter means only Lady Jean Ker;—attending to every provision in, and to every word of that instrument which shews that the word “eldest daughter,” (a term capable of meaning, and in common parlance meaning neither more nor less than the eldest-born daughter,) was to be applied sometimes to one individual and sometimes to another, and more than one individual,—which shows that the singular *person* was sometimes to be applied to one individual, and sometimes to another, and more than one individual:—attending to every provision and word which shews the meaning of the words, “her,” “them,” “their,” “person,” “portion,” “daughter,” and all the plural and singular senses in which they occur; and attending to the whole of the phrase of this clause,—to every word of this clause as the very word which the author of this deed meant to insert in his deed, because he has inserted it, and upon this great leading principle, that in judgment you never can (unless you are justified by unavoidable necessity) reason upon the supposition that the man has made a mistake, by inserting in a deed the word which he has inserted in it; admitting, that where you are driven by absolute necessity to do that, you must do it;—attending to the whole and every part of this deed of 1648 itself, after the most anxious and attentive consideration, and on the deliberate consideration which I have given to this deed, I offer to your Lordships my humble opinion upon this first point of the cause, that the words “eldest lawful daughter, and their heirs-male,” mean (whatever be the meaning of the words “their heirs-male,”) the daughters *successivè et seriatim*; and that if the heirs-male, accord-

ing to the true interpretation of this deed, of Lady Jane Ker have failed,—if the heirs-male of Lady Anna, the second daughter, according to the true interpretation of this deed have failed,—then that the heirs-male of Lady Margaret, according to the true interpretation of these words “heirs-male,” are entitled as heirs of tailzie under this deed. My Lords, I wish to be understood here: I say, if they have failed. I observe, that in the Court below, and in many of the papers, they have had another way of considering this, and that is, that a daughter could not become the eldest daughter, unless her eldest sister died in her lifetime. That is not my idea of the true meaning of this instrument. If it is a *seriatim* substitution, as I think it is, in my view of the case, it is immaterial whether the eldest sister died before the younger or not; the eldest *debito tempore*, or *de tempore in tempus*, by herself, and in her heirs-male, that is, in the series in which she and they were called, would, in my opinion, be entitled to take the succession.

Having offered to your Lordships my humble judgment upon this one point, your Lordships will permit me now to say, that I have very studiously hitherto refrained from saying one syllable indicative of any judgment I have formed with respect to the words “heirs-male.” Whether the words might be understood to mean heirs-male generally, or heirs-male of the body. I have done so for this reason principally, that though undoubtedly as long as I shall live to remember this cause, if I shall have made a mistake in the part of it that I have discussed, and your Lordships shall act under my mistake, to the longest time I shall live to remember this cause, from the moment I am convinced of my mistake, I shall deeply regret it, considering the important interests here at stake; yet I am aware, that of this branch of the cause it may be said, it is but mistake which affects this particular case, and that it is important principally to the parties only; but with respect to the other question, I have been anxious to keep it distinct, for this reason, that the decision upon that is to affect not this case alone;—that it is a decision to which your Lordships cannot come, without considering it upon its principle,—without considering it with reference to precedents,—without considering it with reference to its consequences, without considering it with reference to all the ways in which it may affect, and most deeply affect, landed titles, and titles of honour. My Lords, I have

formed an opinion upon it, and that opinion I shall take a very early opportunity of delivering to your Lordships; but I look upon that part of the case as so extremely important, that I have been anxious, as far as my mode of reasoning would enable me to keep them distinct, to take care not to confound one point with the other; that with a view to come to the right conclusion upon that second point, your Lordships may find yourselves in possession of observations so laid before you upon the first point, that you might be able to apply them in the consideration of this case to that point only.—I shall now, with deference to your Lordships, humbly propose, that having given my opinion upon this first point, in the course of this afternoon, you should adjourn the further consideration of this case; and if your Lordships will have the condescension to grant to the individual who now addresses you that request, I should hope you will not feel yourselves unwilling to permit me to proceed upon the consideration of the next branch of the cause on Monday at eleven.

THIRD DAY. *Monday, 19th June 1809.*

My Lords,—On the last day on which your Lordships met for the consideration of this cause, I submitted to your Lordships, as my humble opinion, that the persons described in the clause in the deed of 1648, commencing with the words, “which all failing, to the eldest daughter and their heirs-male,” were to be considered as heirs of tailzie. I also stated to your Lordships, that it did not appear to me that it would be possible to hold, that, under the effect of the instruments subsequent to the year 1648, connected with possession upon any ground of prescription, the investitures of the estate were changed from those which stood as the regulating rule of the succession in 1648. I likewise stated to your Lordships, that, in my judgment, the deed of renunciation and appointment upon the marriage of Lady Margaret did not destroy the title which Sir James Innes now insists upon, if Lady Margaret ever had a title; and I further added an opinion which I had formed, and which, upon reconsidering it since I last had the honour of addressing your Lordships, I have not found reason to

change, but which, I might, I think, be justified in saying, I hold more firmly than I did even then, that the destination to the eldest daughter, connected with such a context as that in which it occurs, —occurring in such a deed as that in which we find it,—I do not mean a deed as partaking more or less of a testamentary nature, but a deed, such in its contents, such in its expressions, and such in its objects, as this deed of 1648,—that the singular term, “ eldest daughter,” connected with the plural pronoun “ their ” heirs-male, and the other terms of the clause, did constitute a *seriatim* substitution of the four daughters of Hary Lord Ker, and their heirs-male, of some species. My Lords, I have only to add to that, (which, it may be proper for me shortly to intimate, altho’, for reasons I before alluded to, it is impossible for your Lordships to come to any decision upon the question of dignities,) that, giving as pointed an attention as I could to what has been stated from the Bar, with reference to the effect of this charter of 1648, as intended to pass the Earldom of Roxburghe, and to what has been stated at the Bar as to its efficacy or inefficacy in passing that Earldom, regard being had to the seal by which it is supposed to be authorised, and to the other circumstances which formed the topics of argument upon this head at your Lordships Bar ; it occurs to me, that it may not be unfit that I should state to your Lordships, that my opinion upon that question which we last discussed, as well as upon that which we are this day met to discuss, would be precisely the same, whether the honour does or does not pass by the deed of 1648. That it was intended to pass, is certainly the opinion of the individual who now addresses you ; but whether it did or did not pass, whether it was or was not intended to pass, would not, in the judgment of that individual, much affect, not materially affect, the decision of the questions with respect to these estates.

My Lords, The question now presenting itself to our consideration, I would put very shortly thus : Whether the words “ heirs-male,” in the clause to which we have so often had reference, mean, in the intention of the author of this deed, as that intention is to be collected from the context and the other parts of the same instrument, for so I would put the case to your Lordships, whether these words “ heirs-male ” mean heirs-male general ? or whether they mean “ heirs-male of the body ” of the person or persons to whom they refer ? And, my Lords, having stated it to your Lordships as my opinion, that there is a succession of substitutes among

these daughters, the question, as put by me at least to your Lordships, must be, Whether these daughters *successive*, and their heirs-male, mean a description of persons, heirs of tailzie, and their heirs-male general, or the heirs-male of their bodies? and that question arises amongst daughters designed, in my view of the subject, to take one after another in that species of succession.

I need not tell your Lordships, that the law of Scotland, as to descent, is very different from the law of England. It is therefore not my intention to trouble your Lordships with any observations upon the rules of English law with reference to the interpretation of deeds and papers. I apprehend it is hardly safe to do that. This case must be decided by Scotch law, as well as we can collect it, as applicable to dispositions of this kind, to take effect after the death of the author. We are to apply Scotch rules as to deeds or wills, which, your Lordships know, are very different from our rules; and, in that view of the case, I lay out of it all consideration of the much agitated case of *Perrin versus Blake*, and some other cases which happened in England when your Lordships and I were young; because it does not appear to me that we can borrow much of useful argument from them.

My Lords, This question is to be decided by discussing it upon principles, by discussing it with reference to the cases which have been determined, and by endeavouring to apply, as well as we can, the principles resulting out of general doctrines, and the principles to be gathered from the cases which have been decided, and bear upon the same points, applying, as well as we can, those principles, to assist us in the construction of this instrument.

My Lords, I shall begin with the cases first; because, if it be true that the case of *Hay of Linplum** has fixed this as a rule of law, as I see some of the Judges in the Court below seem to have thought, that the words "heirs-male," occurring in such a destination as this, I repeat the words, "occurring in such a destination as this," had that precise, fixed, technical meaning, which no intention, however clearly expressed, could controul, which no intention, however clearly manifested, can separate from the words, it is in vain we look beyond the cases; and it is in vain we look to doctrines; for if there be a solemn decision in this House which governs the present case, upon the ground upon which I am now

* *Robert Hay v. Miss Frances Hay*, 24th July 1788, (Mor. Dec. 2,315,) affirmed in House of Lords, 7th April 1789.

putting it, *cædit questio*. It would be misspending time to discuss the matter further.

My Lords, Till I looked back to the date of the case of Hay *versus* Hay, and found there the name of the person who is now addressing your Lordships, as having been counsel in it, I acknowledge to your Lordships, that I had totally forgotten the case,—that I knew no more of it when it was mentioned at the Bar, than if I had never been employed as counsel in it. I have two apologies to make for that to your Lordships; one, that I have lived many years since that case; and the other, to assure your Lordships, that I am not surprised that so much matter as has been pressed into my head since, should have pressed out of my head the matter which was then in it. I have, however, my Lords, the papers in that case before me; and the question is, Whether it be possible to maintain, first, that this was *necessarily* the opinion of the House of Lords when it decided that case? Secondly, if this was not *necessarily* the opinion of the House of Lords when it decided that case, whether the House went upon any other principle, than that it thought itself bound, in that case, to say, that it was the intention of the author of that deed, that the heirs-male generally of Alexander Hay should take; or that it was not the clear manifest intention that they should not take. My Lords, Before I state to your Lordships the deed itself which was construed in the Linplum case, you will permit me to say, that the question, Who are meant by a destination? has been considered with more or less of laxity by different Judges in the Courts below. Some of them seem to have been of opinion, that entails, which are *strictissimi juris*, are so with respect to the fetters only. Others have thought, that they were *strictissimi juris* with respect to the construction of the words which were meant to describe the persons intended to take under the destinations: and it has been put, and well put to us, that it is, in a sense, a question of fetters; because it is necessary for every person put under fetters to be able to collect in a deed, whom the fetters attach upon, and by whom those fetters can be enforced; and I think I may therefore, in a sense, venture to state to your Lordships, that the construction adopted ought to be the clear and fair construction of the words.

My Lords, The Linplum case arose upon a settlement, with reference to which, I should not do justice to the present case, if I

did not state, that, like this Roxburghe case, it was a regular entail;—like this Roxburghe case, it was not to take effect till after the entailer's death; like this Roxburghe case, the question discussed and decided in it was a question of competition between heirs,—it involved nothing with respect to creditors or onerous purchasers: there was not therefore that distinction in it which, your Lordships recollect, we have heard much of at the Bar;—it was upon the construction of a clause relating to destination;—it was upon the construction of a clause, upon which the question depended, On whom, and in favour of whom, the fetters were imposed?—it was upon a construction of a deed, in which it is undeniably true, that there were strong circumstances to infer an intention, in the use of the words “heirs-male,” to limit to “heirs-male of the body” of the party. It is indisputably true, too, that it was a case in which subsequent substitutions included the very individuals who would fall under the description of heirs-male of Alexander Hay. It was a case, too, in which it must be admitted, that a very useless, but anxious attempt was made to separate the Linplum property, in certain events which might take place, from the Tweeddale property, from the Drummelzier property, from the Roxburghe property. It was a case, in which it must be indisputably admitted too, that the phraseology of the deed furnished, in different instances, and in numerous instances, both the words “heirs-male,” “heirs-male of the body,” and the words “heirs-male whatsoever.” It was a case too, in which, in certain events, the supposable intention of the author of the deed, I say the supposable intention of the author of the deed, (for though, in the construction of instruments, we are, judicially speaking, to suppose, that every granter foresaw all the events to which his words can be applied, yet, in point of fact, we know that is not the case,) that the supposable intention of the entailer would be defeated. All these circumstances may, I think, be predicated of that Linplum case; and it is fit that your Lordships, with a view to determine what weight is due to my opinion, should be informed, that I am aware that all those circumstances may be predicated of that case.

Having stated so much, your Lordships will now permit me to state to you the substance of the deed in that case. It was made by Sir Robert Hay of Linplum; and he disposed to himself, and to his sister Lady Margaret Hay in liferent, and to the second son

to be procreated of the body of the Most Honourable John Marquis of Tweeddale, and the lawful heirs-male of his body, in fee. And I stop here a moment to observe, that this case was open to precisely the same observations as have been made upon the Roxburghe case; that there are express limitations, in four or more instances, prior to the destination to Alexander Hay, to persons, and "the heirs-male of their bodies begotten," in terms; then to the third lawful son, and to the heirs-male of his body; and so on to all the Marquis's younger sons, one after another; and failing all his lawful sons, and the lawful heirs of their body, to the Right Honourable Lord Charles Hay, brother-german of the Marquis, and the heirs-male to be procreated of his body; whom failing, to the Right Honourable Lord George Hay, another brother-german of the Marquis, and the lawful heirs-male to be procreated of his body; whom failing, to Alexander Hay, second son to Alexander Hay of Drummelzier, Esq.; and his lawful "heirs-male." My Lords, This second son had an elder brother of the name of William, and he had either three or four younger brothers; and I press upon your Lordships attention that circumstance, that he had three or four younger brothers; "whom failing, to the Honourable "John Hay of Belton, Esq.; and his lawful heirs-male." He had also a younger brother; "whom failing, to the Honourable John "Hay of Lawfield, Esq.; and his lawful heirs-male." I think I am correct when I say there was a younger brother of him also; "whom failing, to Lord Robert Ker, second lawful son to the "Duke of Roxburghe, and his lawful heirs-male; whom failing, to "the heirs-female lawfully to be procreate of the bodies of the "several persons above mentioned, one after the other, beginning "with the heirs-female to be procreate of the body of the said "John Marquis of Tweeddale, and observing the same order and "course of succession above written, the eldest heir-female, failing "heirs-male, always secluding the rest, and succeeding without "division; and that whenever, and as oft soever as the succession, "upon the failure of heirs-male, shall happen to fall or devolve to "heirs-female; whom failing, to my own nearest lawful heirs and "assignees whomsoever."

Your Lordships therefore perceive that the destination was of this sort: It was a destination to the second and other sons, and the heirs-male of their bodies, of the Marquis of Tweeddale;—it was a

destination to Lord Charles Hay, and the heirs-male of his body;—it was a destination to Lord George Hay, and the heirs-male of his body;—it was a destination to the second son only of Alexander Hay of Drummelzier, and his heirs-male;—it was a destination to Hay of Belton himself, and his heirs-male;—it was a destination to Hay of Lawfield himself, and his heirs-male;—it was a destination to the second son of the then Duke of Roxburghe, and his heirs-male;—and then it was a destination to the heirs-female of the bodies of the several persons above mentioned, and the heirs procreated of their bodies. Your Lordships will be good enough to keep in mind the variegating (if I may so express myself), the variegating nature of these respective destinations.

My Lords, He proceeded to bind and oblige his heirs to infeoff all these persons, Mrs. Margaret Hay, his sister, in liferent, and the second son of the Marquis of Tweeddale in fee, and on failure of them, the other substitutes and heirs of tailzie above specified; and then he goes to that part of the instrument which contains an obligation to resign. He repeats in that again the same limitations; and then he proceeds to state himself thus:—" With this express provision, that the said second lawful son to be procreate of the said Marquis of Tweeddale, and the heirs-male of his body, and also the whole heirs of entail before mentioned, succeeding in the right of the said lands, annual rents, and others, shall be obliged to assume and constantly to retain, use, and bear the surname and designation of Hay of Linplum, and use the arms and coat-armorial of this family as their own surname, designation, and coat-armorial in all time coming. And it is hereby farther provided and declared, that it shall not be leisome nor lawful to the said second son to be procreate of the said Marquis, or the lawful " heirs-male of his " (that is, the lawful heirs-male of his body), nor to any of the said heirs of tailzie, nor their descendants, to alter that destination." I will not trouble your Lordships by going through all the prohibitory, resolute, and irritant clauses: the first material expression that occurs here to be laid hold of, by way of applying it as a context, constructive of the clauses of destination, which I need not tell your Lordships are the clauses most material to be looked at in these cases, is this:—" It shall not be leisome nor lawful to the said second son to be procreate of the said Marquis, or the lawful heirs-male of his."

My Lords, No man can deny that the words "lawful heirs-male of his," there mean "heirs-male of the body;" because these his lawful heirs-male who were to take were heirs-male of the body; and therefore this is an instance of itself, not how fit it may be in general cases, or in most cases, or in any particular case other than this, to say that the words "lawful heirs-male" will admit of a construction, which construction gives to them the same meaning as if the words had been "lawful heirs-male of the body;" but it proves this truth undeniably, that there *may* be some cases in which "lawful heirs-male" must mean "lawful heirs-male of the body;" for here they cannot mean any thing else. "Nor to any of the said heirs of tailzie, nor their descendants." It was observed upon these words, "their descendants," that these words were material to show that the author of this deed meant *throughout* "heirs-male of the body," because none but heirs-male of the body can be descendants. It was answered on the other side, that the word, at any rate, was but surplusage; that the words "heirs of tailzie," would include all heirs of tailzie, whether descendants or not; and that the words "their descendants" were most clearly used, not in their strict proper sense, because descendants would not only include heirs-male of the body, but heirs-female of the body; and the question upon the whole instrument was, Whether "lawful heirs-male," "lawful heirs of his," "lawful heirs of his body," "heirs of tailzie," or "descendants," were not, each and every of them, meant, *referendo singula singulis*, to describe the heirs of tailzie, whether heirs-male general or heirs-male of the body, as the whole of the respective clauses of destination pointed them out as being heirs-male general, or heirs-male of the body. In another part, the expression is "lawful heirs-male aforesaid," which *may* mean both species of heirs-male. It is to be observed, that the word "descendants" occurs, I think, five or six different times in the instrument.

My Lords, There was then a clause which was thought to be material. After describing the several cases and acts in which and by which this tailzie might be prejudiced, it says, "Then and in that case, every one of the facts and deeds to be done in contravention hereof by the said second lawful son to be procreate of the said John Marquis of Tweeddale, or his 'heirs-male' aforesaid." There your Lordships see, that the words "heirs-male" apply to those who are, in the beginning of the deed, expressly described as

heirs-male of the body lawfully begotten. In the passage I have last read, there are no such words as "of the body lawfully begotten;" but there is a context which must help you to the construction of the words "heirs-male" in the clause I have pointed out, regard being had to the clause destining to heirs-male. This simple word "aforesaid" is, as the word "said" is in many instances, as the words "herein-before provided," "herein-before nominated," are in many instances, explanatory words of context, this word of context going to make out what heirs-male are intended in the description to which the word is annexed. "And further, the said second lawful son to be procreate of the said Marquis of Tweeddale, and his 'heirs aforesaid:'" There, your Lordships observe, the word "male" is dropped, as well as the words, "of the body," and the word "aforesaid" must be understood as the context to the word "heirs," including in it a description amounting to precisely the same as if the word "male" had been inserted, and as if the words "lawfully begotten of their bodies," had also been inserted.

There was then a clause, my Lords, which is a very material one. "If it shall happen that the right of the subjects hereby entailed shall devolve to the said second lawful son of the Marquis of Tweeddale before his existence, then it shall be lawful to the said Lord Charles Hay, or to the nearest heir of entail in being at the time, to establish titles in his person to the lands and others therein mentioned, and to enjoy the rents and profits thereof, until the first Martinmas or Whitsunday inclusive following the birth of the said Marquis's second son; and then the said Lord Charles, or nearest heir aforesaid, shall be obliged to denude himself in favour of the said Marquis's second son, in the same manner as is here provided if the said Lord Charles Hay had succeeded upon a contravention of an heir of entail." The professed object, your Lordships observe, of this deed is, that the Tweeddale estate and the Linplum estate should not come together; and at the same time the express object is, that the Linplum estate should go to the second son of the Marquis, whether he was come into being at the time the succession opened to him or not; and I think I may venture to repeat the observation with which I troubled your Lordships on Saturday, that no body can doubt that these words "second son" must mean second son for the time being, and that it is a singular term, including all persons who might answer that description.

My Lords, We learn that the events that happened were these : Sir Robert Hay died without issue in 1751. I ought to have mentioned, because it is a circumstance taken notice of, and for that reason only I ought to mention it, as I really do not think there is any weight in it, that he had executed a settlement of his personal estate in favour of the same series of heirs, which was only another proof of his determination to use the same destinations. He died without issue in 1751 ; and John, then Marquis of Tweeddale, having but one son, the succession devolved upon Lord Charles Hay, the Marquis's immediate younger brother, and the first substitute in the aforesaid deed of entail, failing younger sons of Marquis John Lord Charles also having died without issue, the succession next opened to Lord George Hay, the youngest brother of the Marquis. The Marquis of Tweeddale left issue an only son, an infant, who died in 1770, when the dignity and estate of Tweeddale devolved upon Lord George Hay, the late Marquis (who was such at the time this case occurred). Alexander Hay, the second son of Alexander Hay of Drummelzier, and the next *nominatim* substitute in Sir Robert Hay's deed of entail, having died before this period without issue, the respondent, Robert Hay of Drummelzier, who was one of his younger brothers, insisted, that, as heir-male of his brother the deceased Alexander, heir-male of him, tho' not heir of his body, he was entitled to the estate ; he brought an action for the purpose of trying that question ; and having brought that action, it was determined by the Court of Session, and I think afterwards by your Lordships, that the Marquis was entitled to keep these estates till he should have a second son of fourteen years ; and the estate of Linplum was accordingly held by the Marquis till his death in 1787. Upon that the respondent renewed his claim, and there was an adverse competition for the estate. The appellant was Miss Frances Hay, who was the only child of the marriage of William Hay and the deceased Lady Catherine Hay. She insisted, she had a title to the estates under the effect of that clause of destination which I have stated to your Lordships, relating to females who were to take ; and the question which was actually agitated and decided in that cause was, Whether the brother of Alexander, as the heir-male of Alexander, was entitled to the estate ? or, whether the limitation to the heir-male of Alexander meant a limitation to the heirs-male of his body ? If it did, his brother, not being the heir-male of his body,

could not take, and then the substitution of the female line had opened.

My Lords, The Court of Session were of opinion that Alexander's brother was entitled, and that this instrument was so to be construed. They did not form that opinion either upon the notion, that the terms were altogether inflexible, or upon the notion, that there was nothing in the deed to show that it was not the intention of the author of the deed, that those words were to have in construction what, it was admitted on all hands, was their obvious meaning, and their *prima facie* meaning. They seem to have relied also upon a case of Baillie *versus* Tennant,* which does not appear to me to have had much application to the subject that came before your Lordships in the Linplum case, when it was argued at this Bar. I cannot charge my recollection with the matter of fact by whom the Linplum case was argued on all sides. I think it was argued by Mr. Wight and Mr. Tait, both gentlemen whom your Lordships recollect to have been very considerable in their profession. I speak from a full persuasion upon memory, when I say, it was very ably argued by the late President of the Court of Session; and I had the honour of giving him my very feeble assistance upon that occasion. I observe that, in his situation as Lord President, he makes upon the present occasion an observation, to the accuracy of which I can bear a good deal of testimony, I mean from my own individual experience, that we professional men are sometimes extremely discontented with decisions which, after a lapse of some few years, perhaps, we can subdue our obstinacy so far, as to admit to have been quite right. I believe we were both out of humour with the decision, perhaps not very reasonably.

My Lords, The whole argument was before your Lordships in the papers laid upon your table, signed by Mr. Wight and Mr. Tait; and it does appear to me to be so material to lay the whole of that argument before your Lordships again, with some comments upon it, with a view to the right decision of this case, that I am sure your Lordships will spare me as much time as shall be necessary for that purpose. My Lords, if it had been true that the Noble Lord who then sat upon the wool-sack, and any other Noble Lords then present in the House, deemed it to be clear in the law of Scotland, that these words "heirs-male" occurring in such a deed as this Linplum

* See *infra*, page 79.

charter, looking at the clause in which it occurred—looking at all the expressions of the instrument—that they necessarily, imperatively, and inflexibly must mean “heirs-male general;” to be sure they suffered Mr. Tait, Mr. Wight, Sir Ilay Campbell, and myself to be guilty of a great deal of impertinence, for it was argued at much length—your Lordships will, I think, see by the cases, that the case turned upon this,—that the words “heirs-male” had a *prima facie* obvious fixed meaning, not to be torn from them, except upon what might be stated to be declaration plain of intention, and, to use Lord Hobart’s phrase, declaration plain, or absolutely necessary implication.

Your Lordships will see, from the printed cases, that the argument went upon the question, Whether the intention was sufficiently manifested to destroy the general meaning of the words? When I say it went upon the question, whether the intention was sufficiently manifested? I do not mean to say the other question was not discussed—far from it;—but that the decision did not necessarily establish that principle of inflexibility, which has been contended for at your Lordships Bar, I think myself fully entitled to assert. I am confident that, if it had been the intention of this House to have asserted a great principle of that kind, your Lordships would have found it embodied in the judgment; and if you do not find it embodied in the judgment, and the case will admit of a consideration not necessarily establishing so large a principle as that, your Lordships will hardly infer, that the case meant for ever to establish that as a principle, and an inflexible rule of law. I am sure I need not remind your Lordships of the caution with which you proceed as to laying down principles to regulate cases—not laying them down unnecessarily—not forbearing to express them when you mean to establish them;—you do it with care in English appeals—but with respect to Scotch causes, I never saw any one sit upon that wool-sack who did not think that he was called upon to act very carefully and cautiously, and clearly, in laying down general principles, or acting upon general principles not expressed in judgment, that should regulate questions of Scotch title. As to the principles upon which these deeds are to be construed,—if the author of such a deed said—“I give to John and his heirs-male”;—and in the next line he should say—“I mean by the words ‘heirs-male,’ the heirs-male of the body,” it would be difficult, upon any doc-

trine or any principle that I have heard of, to say, he did not effectually destine to "heirs-male of the body." So the nature of the subject purchased may affect construction of such words. If a man, having landed estate, purchases an accessory subject, whatever the words are by which he takes that subject to his heirs, you have been told it will go to that series of heirs to whom the other property is destined. A great many cases have been put in argument which go the length of contending, that where a man by a deed limits to A and the heirs-male of his body, and then to B and "his heirs-male," with remainder to his own lawful and nearest heirs-male whatsoever, and then, by another deed of even date, expresses himself to have limited to B, and the heirs-male of his body,—the effect of the latter deed will give a construction to the words "heirs-male" in the former. Those cases were put, as cases in which it might be well contended, that the author of the deed had given explanation enough of his deed to authorise the Court to say, that that intent expressed in such words, though in another deed, could be legally carried into effect. My opinion upon that I do not state; but I have expressed an opinion, that a declaration plain in the same deed, notwithstanding any thing I have heard urged to the contrary, may have such an effect. My Lords, those who were to answer Sir Ilay Campbell and myself, I must say answered us upon paper a little better than we answered them,—they gave an answer to what was observed by us upon a very famous passage, quoted from Sir Thomas Craig*: it was quoted too repeatedly in this case. "He puts the case, of an entail made to A, *et hæredibus ex ejus corpore masculis*; and then to B, *et hæredibus ex ejus corpore masculis*; and then to C, *et ejus hæredibus masculis*; *quibus omnibus deficiantibus, hæredibus dicti Titii, sive primæ personæ masculis quibuscunque*." It was contended upon the text of that author, that he meant precisely the same species of heirs under the words "*hæredibus masculis*" of C, as he did under the words "*hæredibus ex ejus corpore masculis*" with respect to A and B; and this instrument of Linplum having been executed about 1748, we contended on our part, that the expressions "heirs-male" of Alexander really meant the same heirs as Craig meant, tho' it was said that there was a great deal more of nicety and attention to technical phrases in modern conveyances than there was in ancient deeds or ancient

* Craigii Jus Feudale, L. 11. Dig. 16. § 19.

writers. I cannot take upon myself here to say to your Lordships how that is in point of fact; and indeed I think it would be a very dangerous thing to attempt to state, if I knew more of the fact, what stress your Lordships ought to lay upon such a fact in construing this Roxburghe deed. One thing is quite clear, that all the old investitures of *this estate*, from fourteen hundred and odd, had most technical limitations to the heirs-male of the body. It is consistent with that fact, that both expressions might be used to signify the same description of persons; but it is a clear fact, that those who so describe the heirs-male of the body, knew technically how to do it, not only in 1648, but for at least two centuries before, as appears from the settlements of this family.

Your Lordships will find, in the printed case of the respondent in the Linplum cause, that we were told, that a single observation might be sufficient to strip the appellant of the aid she endeavoured to draw from Sir Thomas Craig; for if, according to the ideas that were in his times entertained of tailzied succession "heirs of the body" could only be called in such a settlement, *then, no doubt, the two terms of heirs-male, and heirs-male of the body, must, in respect to deeds of that sort, have been synonymous*; and this admission is far from an immaterial one. It goes a long way to admit a case in which "heirs-male" would be flexible in construction; but it was observed that very different ideas were now entertained; and that the distinction between "heirs-male" and "heirs-male of the body" was as well understood, and as generally known as that between heirs and heirs-male. But, my Lords, "heirs," by context, may mean "heirs-male." We insisted, that the act of 1685 itself furnished an instance of the flexibility, not perhaps of the term "heirs-male," but of that term "heirs"; and that that was furnished by the clause which, your Lordships will recollect, forms a part of it: "That if the said provisions and irritant clauses shall not be repeated in the rights and conveyances whereby any of the heirs of tailzie shall bruike or enjoy the tailzied estate, the said omission shall import a contravention of the irritant and resolute clauses against the person and 'his heirs' who shall omit to insert the same, whereby the said estate shall *ipso facto* fall, accrease, and be devolved to the next heir of tailzie."

To this it was answered, and very properly answered, that the word "heirs," there, is of itself a more flexible term, as it certainly

is, than "heir-male," if heir-male be a flexible term ; and that the word "heir" must receive its construction from the context ; and as to the effect of any entail which was to be registered, if it was an entail to A and the heirs-male of his body, and then to B and the heirs-male of his body, and then to C and his heirs-male, and then to D and his heirs-male whatsoever—then the word "heir" in the statute would suit and accommodate itself, *referendo singula singulis*, to the sense in which it was necessary to understand it, regard being had to the different series of heirs through whom, from the heirs of tailzie, the estate was to pass ; and the worth of the observation on our part certainly was not considerable.

My Lords, It was further stated in the printed case, that in that proceeding which was had when the Marquis of Tweeddale was declared to be entitled to the estate till he had a second son of fourteen, the Lord Ordinary's interlocutor found, "That the deeds of " entail upon which the question in debate arose, were not devised " upon any regular or uniform plan, and so must be taken as Sir " Robert or his writer had chosen to express them." Now, that is the principle of the decision which my Lord Ordinary had embodied in his interlocutor. Is that the language of a man who was prepared to say, that if there was a regular and uniform plan in the instrument, in construing the words of the instrument he would pay no attention to it ? Is it the language of a Judge, who had before him a settled, inflexible, unbending rule of law, known to him and his brethren, which could not be affected by any plan or form of instrument, however regular or uniform ? No, my Lords, the *ratio decidendi*, as far as his judgment goes, is directly the contrary. The respondent then further said, that if the intention was to prevail over the words, the appellant's claim to the succession, taken upon the question of intention, was ill founded ; for she would be obliged to make out, that the author of this deed intended, having given an estate to the second, and other sons of the Tweeddale family, and the heirs-male of their bodies,—having passed over the father and the elder brother of Alexander Hay, and given an estate to him and his heirs-male, Alexander, the second son, having a third, fourth, and fifth brother, three or four younger brothers, it is not material how many,—that it was the intention of the author of the deed, although they might take as his heirs-male, to pass them all over,—to pass every one over, though he had not substituted them *eo*

nomine, as he had substituted the third, fourth, fifth, and sixth, and other sons, in the preceding destinations; and that he not only meant to pass over them, and to let in before them Hay of Belton, and his lawful heirs-male, and Hay of Lawfield and his lawful heirs-male, and Lord Robert Ker, the second son of the Duke of Roxburghe, and his lawful heirs-male; but with a priority to the younger brother of Hay of Belton, to let in Hay of Lawfield, and his heirs-male, and with a priority to the younger brother of Hay of Lawfield to let in Lord Robert Ker, the son of the Duke of Roxburghe, and his heirs-male generally; and to let in the whole females who were to succeed, with a priority to the younger brothers of Alexander Hay of Drummelzier, Hay of Belton, and Hay of Lawfield.

My Lords, I beg your Lordships attention to a reason which was then stated, and which was much relied upon at that time, which has a very strong bearing upon the present case. In the construction of instruments, it is one thing, by construction, to include persons who may be intended to be included, though not named, and another thing, by construction, to endeavour to exclude those who might not be intended to be excluded. In the case of Hay of Drummelzier, this House adopted a construction, which imputed to the author of the deed, the intention which it was natural the author of that deed should have, which did not exclude the younger brothers of Alexander, which did not exclude the younger brothers of Hay of Belton, which did not exclude the younger brother of Hay of Belton, which did not exclude the younger brother of Hay of Lawfield. Your Lordships will pause, I think, before you look upon that as an authority binding you to a construction, which certainly does not *absolutely* exclude the heirs-male of the bodies of Lady Jane Ker's three younger sisters, but which in fact leaves them little chance of ever taking the estates beneficially.

My Lords, Did the counsel who argued that case of Linplum suppose, that if there had been a substitution of Alexander's brothers one after another, the decision would necessarily have been the same upon the words "his heirs-male." Mark, my Lords, their expression as to this point. "To suppose that Sir Robert Hay intended to prefer to the younger sons of Hay of Drummelzier, not only Hay of Belton, Hay of Lawfield, and Lord Robert Ker, but even the heirs-female of their bodies, and, in like manner, to prefer Lord Robert Ker, and the heirs-female of his body, to the

“ younger brother of Hay of Belton, who still exists, and the
“ younger brother of Hay of Lawfield, who then existed, is alto-
“ gether improbable ;” whereas, upon the footing of his meaning
to prefer all the younger sons of the family of Drummelzier, in
their order, to the other families of Belton and Lawfield, &c. your
Lordships will perceive an obvious and satisfactory reason for the
difference observed between the younger sons and brothers of the
Marquis of Tweeddale, and the other substitutes. *The former were
called separately and seriatim : it would therefore have been absurd
to call their heirs-male general ;* and it sufficed to call only the
heirs-male of their bodies. But in the other substitutions, *where
only one of a family was named, it was necessary to call their heirs-
male general ;* which, of course, failing male issue, would carry the
estate to their brothers. It is no doubt true, that, by so doing, the
succession might have been carried beyond the brothers. It cer-
tainly might ; and that prompts me to state to your Lordships now,
that which may have an effect upon this case. It is certainly very
true, that although William, the elder brother of Alexander Hay of
Drummelzier was excluded, as far as express nomination of others
could exclude, from this settlement ; and although it is equally true,
that the father of Alexander Hay was also excluded ; and though it
was also true, that the Marquis of Tweeddale was not intended to
take ; and equally true, that William Hay was not intended to take ;
those persons who were not intended to take, in certain events,
might become the heirs-male of Alexander of Drummelzier, the
second son. Admitting that to be so, the argument proceeded to
contend, that there certainly was a strong ground for saying, that
“lawful heirs-male” here meant “heirs-male of the body ;” but as
to this, we were told that we must take the whole of the instrument
together ; and if we find stronger, or as strong grounds, on the
other hand, for saying, that it was the intention of the author of the
deed to use these terms “lawful heirs-male” in their general sense,
we will interpret them in their general sense. The sons of the
Marquis of Tweeddale have been called *eo nomine*, with the lawful
heirs-male of their bodies. It might undoubtedly, by possibility,
have happened, that they should all have failed before the author of
this deed, and that Alexander himself might have died ;—that his
younger brothers might have died ;—and then that, contrary to the
expectation of the author of the deed, his elder brother, William,

might have taken. But you cannot, because you see, that the execution of the intention of the author of the deed might operate a surprise in some cases which may happen, you cannot therefore say, you will refuse to execute his intention in a case in which he has plainly stated his intention. You cannot refuse to execute his general intention plainly stated, because his expressions, in some possible or particular events, may be suspected by you to go beyond what he thought they might actually reach. The true question upon the instrument in the Linplum case was this, Whether it was made so clear, by reasoning upon the fact, that persons excluded as substitutes would be included as heirs,—by reasoning upon the word “descendants,”—and by reasoning upon the other topics that led to all the material observations, whether it was made so clear that he meant to exclude all the younger brothers of Alexander of Drummelzier,—whether it was made so clear that he meant to exclude Hay of Belton’s younger brother, and Hay of Lawfield’s younger brother, that you would venture to exclude them, by narrowing the terms, and the sense of the terms, under which they *might* be included, and, *prima facie*, were to be taken to be *intended* to be included.

My Lords, I admit, that it is a dangerous rule of construction of instruments, which construes them by reasoning upon events as improbable, which the author of this deed has himself provided for.—I will put your Lordships in mind of the arguments at the Bar, as to the utter improbability of the author of this deed of 1648 having in his meaning any person but the eldest daughter. It was urged, that he, offering these four young Ladies to Drummonds and Flemings, could not think it possible that they should not come together;—that it was quite absurd to suppose that he could imagine, that some or other of them should not marry some one or other of these Ladies, and have issue—male of their bodies;—that therefore he could have actually meant nothing more than a sort of verbal compliment, in this destination, to the eldest daughter. I need not enlarge upon that; but your Lordships will remember the amazing number of cases that were put, upon the improbability that any man, possessed of his understanding, should suppose, that the author of the deed could have looked at them as possible cases; yet I shall satisfy your Lordships hereafter, from the express words of the deed, that all these improbable things are not only contemplated by the author of the deed of 1648, but are, *totidem verbis*, described and provided for in that deed.

My Lords, There was then an admission, on all sides, in the Linplum case, that "heirs-male" might mean heirs-male of the body in a particular clause of the Linplum deed. The deed provides, "That it shall not be leisome nor lawful to the second son "to be procreate of the said Marquis, or the lawful heirs-male of "his," nor to any of the said heirs of tailzie, nor their descendants, to alter, innovate, or change the destination. To this part of it, it was answered truly, that heirs of tailzie would take in both the person who was named as the heir, and every species of heir, who from him was to derive title to the estate. But there is also this clause, that when the second son of the Marquis of Tweeddale, Hay of Drummelzier, or Duke of Roxburghe, comes to the age of fourteen, that then the right to the lands and others foressaid shall fall and devolve to his said second son, and to "his heirs-male,"—"and so on, as often as the same case happens." Now, when your Lordships recollect, that the second son of the Marquis of Tweeddale was to take "to him, and his heirs-male of his body "lawfully begotten;" and when you recollect, that the second son of Hay of Drummelzier was to take "to himself and his heirs—"male," without the words, "of his body lawfully begotten," and that the second son of the Duke of Roxburghe was to take to him, and "his heirs-male," without one word of whose body they were to be procreate; I beg leave to ask, whether you are not compelled by the context to say, that "heirs-male" of the second son of the Marquis of Tweeddale means "heirs-male of the body;"—that "heirs-male" of the second son of Hay of Drummelzier means "heirs-male general;"—and that the "heirs-male" of the second son of the Duke of Roxburghe means "heirs-male general" also;—that they are flexible terms, therefore, bending in construction, the very same words signifying different species of heirs-male, by referring to different destinations for the meaning of the words, as they apply to each;—this Linplum deed itself, therefore (the case which has been supposed to establish inflexibly the sense of the words), proving that they are flexible terms?

That incontestibly proves the same point which I observed to follow from another passage, that "heirs-male" may be used in an instrument to signify "heirs-male of the body," in respect to one, and "heirs-male in general" as to another person; but clearly, that the words *may* mean heirs-male of the body. When I say

that they *may* so mean, I do not say they *must* so mean; that is quite a different thing. Heirs-male here, in the clause cited, must mean "heirs-male of the body," as applied to one person, and not "heirs-male of the body," as applied to another; and the flexibility of the term cannot be more clearly proved than by such an observation as this. There is precisely the same thing to be observed, if you will look back to the bond of tailzie by Hary Lord Ker, on the 18th of July 1640, where it is said, "The second son procreate of the marriage shall succeed to the lands, baronies, and others specially and generally mentioned, and be provided thereto, who shall take upon him the sirname of Ker, and carry and bear the name and arms of the hous of Cessfurd; and that he and 'his heirs'" (that is, such heirs as were to take,) "shall continue to bear the said sirname and arms."

My Lords, With respect to this case of Linplum, I take it to have established merely this, which I think it does not need any case to establish, that the heirs-male may mean, and generally do mean, heirs-male general;—that in construing a deed in which there is a question as to the true intent of the author of that deed, you are to adhere to that as the intent which is the *prima facie* obvious meaning of those words, unless you are, by fair reasoning, —by strong argument,—by that which amounts to necessary implication or declaration plain, driven out of the obvious meaning, and unless you can satisfy yourself, that the author of the deed did not intend that such should be taken to be the meaning of the words he has used, and unless you collect, (I think I may safely add that, and I abstain from going further,) that that is not the meaning of the language of the author of the deed, from what the author of that deed has himself, by the deed, told you is the meaning of his language.

My Lords, Having gone through this case, your Lordships will permit me to say, it is not, in my opinion, a case which proves, that the word "heirs-male" is necessarily, in every deed in which it occurs, an inflexible invariable term. Previous decisions do not, at least none which have been cited to us, seem to have amounted to a determination that the term was so inflexible. The case of Baillie *versus* Tennant*, upon which the Judges seemed to have

* William Baillie v. Agnes Tennant, 17th June 1766; (Mor. Dec. 14941.) Reversed in House of Lords, 26th March 1770.

placed great reliance in the Court of Session, arose under a will, or an instrument in the nature of a will, made by a person of the name of William Walker. It bore date on the 7th May 1752. He says, “ for the love, favour, and affection I have and bear to my sister and her children after named, upon whom I am resolved to settle my real estate, and to prefer them thereto next after the issue of my own body, in the order of succession, and in the terms, and under the conditions under-written, and for divers and sundry causes and considerations me hereunto moving ; wit ye me to have given, granted, and disposed, likeas I, with and under the burdens, reservations, and conditions after specified, by the tenor hereof, give, grant, and dispoise, to myself in liferent, and to the heirs-male of my body ; whom failing, to the heirs-female of my body in fee ; whom failing, to my sister Isabel Walker, relict of John Tennant of Handaxwood, now spouse to Thomas Baillie of Polkemmet, writer to the signet, in liferent, for her liferent-use allenary, in case she shall happen to survive me, and after her decease, to Alexander Tennant, my nephew, eldest lawful son to my said sister, and procreate betwixt her and the said deceased John Tennant, and *his heirs or assignees, in fee* ; whom failing, to William Baillie, eldest lawful son to the said Thomas Baillie, procreated between him and my said sister, his heirs or assignees, also in fee ; whom all failing, to my own nearest and lawful heirs and assignees whatsoever.”

Now, my Lords, the question that arose in that case between the parties, arose in consequence of the following circumstances having taken place. After the death of Mr. Walker, Colonel Alexander Tennant, the first substitute, entered into possession. He died without a settlement ; and then a competition arose between his sister and heir at law, Mrs. Agnes Tennant, and the next *nomi- natim* substitute, Mr. William Baillie ; the former contending, that the word “ heirs ” in Mr. Walker’s instrument ought to be taken, in its proper and technical sense, to signify heirs general ; the latter, that it ought to be restricted, from the presumed will of the maker of the deed, to heirs of the body. The Court of Session thought so ; but this House reversed their judgment ; and I take it, that what is laid down in that judgment of reversal amounts to neither more nor less than this, that the author of that settlement professed regard to two children after named ; that he had made a disposition to the first of them, his heirs and assignees, and failing

them, to the other, his heirs and assignees. Your Lordships will take notice, that here is nothing in the terms of this settlement which looks like a succession to be enforced by prohibitory, irritant, and resolute clauses; nothing of context in the destination itself; nothing of declaration of limited meaning to be found in the other provisions of the deed; nothing but a destination to the first, his heirs and assignees, as dry as a destination to Lady Jane Ker and her heirs-male, without more, would be; nothing like a clause describing the person to take, with reference to marriage, or any other of the circumstances which we have heard commented upon in the present case, and in the Linplum case. The case is only this: A person standing in a relation to two individuals, for both of whom he professes a regard, executes a settlement, by which he gives to one the whole fee (I do not pledge myself to accurate expression), and disposes, in the event of his having no heirs, to another; that is the extent of it; and if he does choose to give the estate in terms, which *prima facie* import so large an interest, would it not have been too dangerous to say, that, merely because it would have been a much more reasonable thing in this man, to have limited it over to the sister, than to have suffered it, under the effect of the first destination, to go to a stranger, because he was the heir to the brother, because that would have been more rational? Would it not have been too bold, for a Court to have declared it to be his intent, that it should not go to the heir, though he has not made use of a single syllable to manifest plainly that he had formed such an intention? The House of Lords did not think itself at liberty to carry into effect a meaning which the House thought more rational than that which the author of the deed had thought proper to express. The House did not think he had sufficiently expressed that more rational meaning. That this case, in any way of considering it, should be deemed authority for the case of Linplum, to the extent of taking that case of Linplum to amount to a decision, that, in whatever context those words "heirs-male" are found, in whatever company they are found, they *shall* mean "heirs-male general," and *cannot* mean "heirs-male of the body," is really a proposition to which I cannot, after considering this a great deal, feel myself able to assent.

Your Lordships have had another case also mentioned as bearing upon this subject, which, I own, appears to me to have no manner

of relation to it: it is the case of *Mrs. Coutts*.* I think it is stated in *General Ker's* case. It is represented thus:—The niece of *Mrs. Coutts* had married a *Mr. Ball*, by whom she had a son named *James*. She was afterwards, however, compelled to divorce her husband, who went abroad, and had no further connection with her or her friends. *Mrs. Coutts* executed a settlement, by which she conveyed her property to trustees, for various purposes, and among others, “to make payment of the several sums of “ money under written, which I hereby legate and bequeath to the “ respective persons after mentioned, and their heirs, executors, “ or assignees.” She then gave to her grand-nephew the sum of 1,800*l.* Sterling; and with respect to this legacy, she afterwards declared that, in the event of the decease of the said *James Robert Coutts*, her grand-nephew, before majority or lawful marriage, this sum of 1,800*l.* Sterling should return, and pertain and belong to her own nearest heirs and assignees whatsoever, absolutely exclusive of his father, and of all his relations by the father's side; and that, during the minority of this grand-nephew, this sum of money, and other effects bequeathed to him, should be under the management and administration of her trustees, and the acceptor or survivor of them, and only the interest arising therefrom, so far as they should judge necessary, bestowed and applied for the use and benefit of her said grand-nephew. She afterwards added a codicil in these words (her grand-nephew being then with the expedition in Egypt): “If my lovely *James Coutts* should not come home, what “ money I left to him I leave to be divided amongst my nearest relations, plate, and other things, I left to my sister *Mrs. Crawford*.”

It turned out that this nephew, who had returned from Egypt, was lost at sea, on his passage from Harwich to Cuxhaven, a few days before this old lady died; and then this question arose, Whether, under this will, his father, as his heir-general, I think, was to take this legacy of 1,800*l.*? Now, of the principles upon which the Court of Session decided, as they did, that the father was to take, I am not able to give your Lordships any account. In this country, your Lordships know, that although you may give a sum of money to the heir or executor of a person who predeceases you, it requires especial words to do it. In the next place, this lady had

* *Ball*, 6th March 1806. See note to *Dykes and Boyd*, 3d June 1813, F. C.

said, if he did not come home, this sum of 1,800*l.* was to go to her own nearest relations. The Court of Session, I suppose, construed the will and codicil thus, or in some such way: that because the lady thought the nephew was living, and to come home, the nearest relations were not to take; but inasmuch as he was dead at that time, they thought that the codicil did not apply to the nephew, who was dead at the time of the codicil being made, but was to be construed with reference to the idea that he was alive at the time; because that idea was supposed to affect the testatrix's mind at the time of making the codicil. They seem further to have held, that the clause as to his attaining the age of majority, or lawful marriage, was a clause not of much effect; and they said, as I understand the case, that that part of the will which gave it to him absolutely, would carry it over to his heirs, executors, and administrators, and that his father could not be excluded. Take this decision in that case to be quite right, how does that case apply to the subject before you? How it should prove, that in no clause,—in no context,—in no deed,—the words “heirs-male” *can* have a limited signification, it requires a person of infinitely greater powers than those of the person who now addresses you to point out.

My Lords, There were two cases very much relied upon on the other side, one the case of the Earl of Ross*, which, on looking into the terms and language of it, I do not find to justify me in taking up much of your Lordships time. The other is the case of the Earl of Dundonald *versus* the Marquis of Clydesdale †, in reference to the Earl of Dundonald's estate, which proves no more than this, which may be proved in almost every instance you look into, that the words “heir-male” *may* signify “heir-male of the body.” The entail is in these words: “We John Earl of Dundonald, being “fully determined, failzieing *heirs-male of our own body*, or ‘*heirs-male*’ of any of the descendants of our own body, to settle the “succession of our estate in one person, and that the same may “not be divided by the succession of heirs-portioners, do hereby “bind and oblige us, and our heirs of line, male, tailzie, conquest, “and provision, and successors whatsoever, *failzieing heirs-male*, “*as said is*, to provide and secure heritably, and to make resignation of all and sundry lands, lordships, baronies, &c. to and in

* See additional case for Countess of Sutherland, p. 27.

† Marquis of Clydesdale v. Earl of Dundonald, 26th Jan. 1726; (Mor. Dec. 1262.)

“favour of our eldest lawful daughter, Lady Ann Cochrane, and
 “the heirs-male lawfully to be procreate of her body; which
 “failzieing, to Lady Susannah Cochrane, and the heirs-male law-
 “fully to be procreate of her body; which failzieing, to Lady
 “Catharine Cochrane, and the heirs-male lawfully to be procreate
 “of her body, our third and youngest lawful daughter; which
 “failzieing, to our other daughters to be procreate of our bodies
 “*successivè*, and the heirs-male of their bodies; which failzieing,
 “to our other heirs-male whatsoever; which all failzieing, to our
 “other nearest heirs and assignees whatsoever.”

Upon the death of Earl John, he was succeeded by Earl William. Earl William being his son, was of course, your Lordships observe, his descendant. He died without issue in 1725; and then the Marquis of Clydesdale, the eldest son of Lady Anne Cochrane, on the one side, claimed the estate, and on the other side, Thomas Earl of Dundonald, who was heir-male general of Earl William. Now, if your Lordships will give your attention to a phrase here, I think that it cannot be considered as clear, which has been confidently said, that this narrative-part of the deed was necessarily set right by the positive part of the deed, containing the destinations, attending to the circumstances and events in which the destinations were to take place; and perhaps it will be found, that it will be extremely difficult to support this decision, unless you are to support it by looking to the effect of the context upon these very words “heirs-male.” Your Lordships will give me your very particular attention to every word of it. “We John Earl of Dundonald, being fully determined, *failzieing heirs-male of our own body, or heirs-male of any of the descendants of our own body.*” Now, here are the words “heirs-male of our own body,” used by one who knew how to make use of them, because he has used them, and there follow instantly upon them, “or heirs-male of any of the descendants of our own body.” Well, said Thomas Earl of Dundonald, I am heir-male of William, and William was heir-male and descendant of your own body, and therefore Lady Ann ought not to take. No, said the other party, that is not so; this is only a narrative of his purpose: when he executes his purpose, the person to whom he gives is Lady Ann Cochrane. But how does he give to Lady Ann Cochrane? he gives to her in this way, “to settle the succession of our estate in one person, and that the
 “samen may not be divided by the succession of heirs-portioners,

" we do hereby bind and oblige us, and our heirs of line, male, " tailzie, conquest, and provision, and successors whatsoever, *failzieing heirs-male as said is*," to provide and secure heritably, and to make resignation of " all and sundry lands, lordships, " baronies, &c. to and in favour of our eldest lawful daughter Lady " Ann Cochrane." Then, might it not be very well said, that the author of this instrument did not himself provide for the daughter till there was such a failure of heirs-male as he mentions. He gives it, " failzieing heirs-male as aforesaid." "*Heirs-male as aforesaid*," may be taken to be " heirs-male of the body," or " heirs-male in general of the descendants of the body;" and if the obvious meaning is to be given to the latter words, which, it is admitted, ought *prima facie* to be given, then why will not those words, "*failzieing heirs-male as aforesaid*," *reddendo singula singulis* mean, failing " heirs-male of his body," and failing " heirs-male general " of the descendants? I apprehend it is then by taking the whole of the words together, the whole of the deed together, that this is explained; the obligation upon heirs to resign, being an obligation placed upon them only " failzieing heirs-male as aforesaid." When a decision was made in favour of Lady Anna, it implies, or seems to imply, that the Court of Session did not think these words, " heirs-male of any of our descendants," necessarily inflexible.

I will not trouble your Lordships with going through that case more at length; but I will proceed to beg your Lordships attention once more to this deed of 1648, which I have so frequently been obliged to trouble your Lordships with hearing stated with a great deal of particularity; but, before I do so, I will refer your Lordships also once more to the deed of 1644; I say not for the purpose of construing the deed of 1648 by the deed of 1644; but your Lordships have a right to look at the deed of 1644 precisely for the same purpose as you look at the deed in the case of Linplum, and the deed in the Dundonald case. You cannot argue from the intention of the person in one deed, that he must have the same intention when he executes another; but you may collect from the phraseology and language of different instruments what is the meaning of language in deeds; and you may learn thus, that in the law-language the same intention is sometimes expressed in the same terms—in terms partly different—or in terms perhaps altogether different.

My Lords, In that deed of 1644 there are, I think I may venture to state to your Lordships, near ten instances in which the words "heirs-male" and "heirs" have not, and cannot have their *primâ facie* sense; for they are deprived of that *primâ facie* sense by the context in which they occur. I think it is a difficult proposition for any man who will apply his mind to this subject, to make out, that the author of a Scotch deed of this kind *cannot* say in that deed, that he means by "heirs-male," heirs-male of the body. Then, if you can make out that he *can* effectually, in express and direct language, say, that he means "heirs-male of the body" by the term "heirs-male," why may he not sufficiently manifest the same purpose by any other words equal to that effect—by any other context which proves that he meant "heirs-male of the body," where the term "heirs" are followed by the word "said,"—by the word "aforesaid,"—by the words "herein before nominated,"—"herein before provided,"—"called to the succession,"—including or omitting in the phrase the word "male;"—these are all so many instances of the context giving to those words a construction which, without such context, would not belong to them.

My Lords, There is a passage in this deed of 1644 which I do not remember to have been much observed upon at the Bar; and I presume to ask your Lordships to listen to it, because there is a similar passage in the deed of 1648, each of which appears to me a passage of very considerable weight in the consideration of this case. Your Lordships recollect the manner in which the destinations were made in the deed of 1644, to the Drummonds marrying these ladies—to the Flemings marrying these ladies—and the heirs of those Drummonds and Flemings,—the heirs of their bodies;—and it has been admitted, and I think full as broadly admitted as it could be, and I think more broadly than I should have admitted it if I had argued this case, that, by the deed of 1644, the heirs of the bodies of the Drummonds and the Flemings, (if the Ladies Kers had died without issue, after they had once performed the condition by marrying them) by any other wives, would have taken—I think that doubtful under the deed of 1644. It is clear, under the deed of 1648 that would not be so. The clause in the deed of 1644 I proceed to read to your Lordships. Allow me, before I read it, again to observe how dangerous a way of proceeding in judgment we should establish, if we were to listen

with as much attention as is asked of us, to all those curious, hypothetical, nice, improbable cases that are put at the Bar, that it never could be in the contemplation of the author of these deeds, that the Drummonds and Flemings should have so little taste, as not to attach themselves to these ladies, and that it was not to be supposed that these Flemings, from the second to the tenth sons, should not like a wife among those ladies with a very large fortune—that it could not be in nature, that these ladies themselves should not be so attached to the Drummonds or the Flemings as to marry them—and that it was not to be supposed that these ladies should all die without issue; and that therefore this clause of destination to the eldest daughter was nothing more than a compliment to Lady Jane Ker, to make her, as it were, the conduit-pipe through which this estate was to get back to the heirs-male of the author of the investiture.

My Lords, Let us see, as to all this, what is the opinion of the author of the investiture himself. The clause is as follows. “It is heirby expreslie provydit that in caise it sall happine ather the forsaides persounes nominate and designit to succeed to us, as saidis or the persounes abovenamitt with whom they are appoynted to matche all ather to be departed this liffe or to be married before thes aid successioun fall to them Thane and in that caise the persounes nominate and being on lyffe being married to persounes of honorll and lawll descent to be frie of that pairt forsaid of the conditioun of the said mariadge and notwithstanding thair of to succed to us in maner before exprest They always keipand observand and fulfilland the remainent conditiounes befor and afterspect and na otherwayes And in caise it sall happine all the foresaides persounes particularlie before namitt appoynted to succed to us in maner forsaid to depairt this lyffe without aires maill lawlie gottine of yr awne bodies on lyffe they mareing as sd is Or zitt give they sall all fail in the observing and fulfilling of the conditiounes above and after mentionat set down to be performit be them.”

Now, my Lords, your Lordships here see, that the author of this deed of 1644 had got into his head, that that might happen which we have heard of as an impossibility, that these ladies should none of them marry these Drummonds or Flemings; and he says, that then, in the cases he puts, they are not to lose the benefit of this

tailzie. But what does he further say upon that? That the gentlemen are to lose the benefit of this tailzie, unless they marry ladies of honourable and lawful descent. He lays upon them precisely the same conditions in this respect, as upon the daughters of Lord Hary Ker afterwards: and although the limitation of 1648 is only a limitation to them and their spouses, and the heirs of their body; yet there is a passage in that deed also, which supposes that none of them may marry any of these daughters, and, in the cases put, provides that they shall not lose the benefit of the tailzie, putting it, however, upon them, to marry persons of lawful descent and honourable quality; and in neither deed, if they so marry persons of lawful descent and honourable quality, is there any *express* limitation whatever to their heirs-male, or heirs of their bodies. Yet your Lordships will hardly say, that the intent of this was to make the Drummonds and the Flemings marry ladies of quality and honourable descent, and yet to give no benefit whatever to their heirs; or if any was intended to be given to their heirs, it was not intended for the heirs of the marriage, as the heirs of their bodies; but they could take none, save by implication.

If your Lordships look at the clause in the deed of 1648, you will find it runs thus: "And sicklike it is providit That in caice it
" sall happen all the foresaids persons to qm our saids airis of
" tailzie respective are appointed by us to be married to depart this
" life or be all married before the said airis of tailzie respective
" sall fall to succeed to our said estate and living." Here, then, the author of this deed puts this very case, that these Ladies may be all married before the succession falls, so that a Drummond or a Fleming could not tender their hands to them. "In that caice
" the persons and airis respective nominate by us in manner
" foresaid are hereby declarit be us na ways to amit bot to have
" and enjoy the benefit and right of tailzie and succession they
" always marrying persons of honourable quality and lawful birth
" and withall keipand observand and fulfilland the remanent
" otheris conditions provisions and restrictions before and after
" mentionat and na otherwise."

Now, is it possible to deny, that the author of this deed contemplated the case, that these Ladies might be all so disposed of that these Gentlemen could not comply with the condition of marrying them? and yet he imposes upon them the condition of marrying

persons of honourable condition and quality ; and then says, they shall enjoy the benefit of tailzie, the right of succession. I found upon that this observation, that if the author of this deed has given to these Ladies and their heirs-male, however the term is understood, *seriatim*, the benefit of succession, in case they did marry persons of honourable quality and lawful birth, not the specially designated heirs of tailzie ; and if the author of this deed has given to these Gentlemen *seriatim* the benefit of tailzie if they could not marry these Ladies, then the author of the deed has in fact contemplated two cases ; one, that the Ladies might marry ;—the other, that they might not marry, these heirs of tailzie named Drummond and Fleming ; and that he did not act upon a presumption, that the eldest daughter would assuredly marry one of these heirs of tailzie. If so, can your Lordships be justified, when you come to interpret this clause of destination, to argue, by assuming, that he never thought that events so improbable might happen, as that the eldest daughter should not, or as that none of these daughters should happen to marry a Drummond or a Fleming ; and therefore has not provided for such events. He has expressly described in his deed of 1648 events such as these. In that instrument, he has destined the estate, in case the daughters marry the specially-named heirs of tailzie, to the heirs-male of the bodies of the daughters *seriatim*. Connected with a condition about marriage, he has, in another event, in the same instrument, not in express terms indeed, destined the estates to the daughters *seriatim*, as I think, and their heirs-male, but by a phrase capable of a plural meaning, and demanding construction,—“ to the eldest “ *dochter* and their heirs-male,” like the limitations in the Linplum case to Alexander Hay of Drummelzier, not expressly naming younger persons *seriatim* ; in which case it was admitted at the Bar, the words “ heirs-male ” might be construed “ heirs-male of “ the bodies : ” but meaning, as I collect from all his expressions taken together, that the younger sisters should take as substitutes *seriatim*, though he does not expressly name them. I ask then, whether all this does not lay a strong probable ground (when you look at all the clauses which affect the Drummonds, the Flemings, and the Ladies, as to the condition about marrying a person of honourable quality and lawful descent,) for saying, you get at a declaration plain, from the whole instrument, that they who were required to marry persons of honourable quality and descent, were

required to marry persons of honourable quality and descent, because it was the intent of the author of the deed, that the succession should be to the heirs-male of the marriages,—to heirs-male of the bodies of those married?

Your Lordships will now permit me to read to you once more this clause: “The right of the said estate shall pertain and belong to the eldest dochter of the said umq^l Hary Lord Ker without division and y^r aires-male she always marcing or being married to ane gentilman of honour^d and lawful descent who shall perform the conditions above and under written qlkis all failzing and y^r sds airis-male to our nearest and lawful airis-male qtsom—ever.”

Your Lordships will have the condescension to permit me to consider myself as speaking to you, as confidently of opinion that this means a *seriatim* succession of the daughters. Then, my Lords, if heirs-male may be applied, may, and must, in some cases, mean heirs-male of the body, the question is, Whether this expression, “their heirs-male,” in this place, means heirs-male of the body? Now the limitations, failing the limitations to the Drummonds, and failing the limitations to the Flemings, would then stand thus: To Lady Jean Ker and her heirs-male, she marrying a gentleman of honourable and lawful descent;—to Lady Anna Ker and her heirs-male, she marrying a gentleman of the same description;—to Lady Margaret Ker and her heirs-male, she marrying a gentleman of the same description;—and then to Lady Sophia Ker and her heirs-male, she marrying a person of the same description; and failing the heirs-male of all of them, (I beg your Lordships attention to that expression, because I do not mean to state that that is the expression in the deed;—I will state the expression in the deed presently,) and failing the heirs-male of all of them, to the heirs-male whatsoever of the author of this deed, Robert Earl of Roxburghe. My Lords, I do not mean to state to your Lordships, that a man cannot make an instrument, containing a succession among sisters and their heirs-male general. It certainly does not often occur that such are made; but there are such. There are instances to be found, where there were successions between sisters and brothers and their heirs general. I have not information enough to know, whether those I allude to contained all the matter that furnishes observations upon this clause in our deed of 1648; but my Lords, I mark this, that when you are con-

struing the words of an inaccurately untechnically expressed clause of this sort, one sort of construction *may* belong to such a clause, and another construction may belong to a regular series of limitations, technically, and drily, and precisely expressed in a better-drawn instrument; and there may be nothing in the instrument itself to affect the obvious meaning of the limitations so expressed.

My Lords, The deed 1648, after the destination to the eldest dochter, &c. says, "which all failing, and their saids heirs-male, to "our nearest and lawful heirs-male whatsoever." Here the word "*all*" has been contended to mean *all the dochters*. On the other hand, it has been said, that it means *all the persons named in the former destinations*, and *their saids heirs-male*. Be it so, my Lords; but this shews the power of context, and the effect of construing the whole deed together: for then the words "heirs-male," by force of the word "saids," mean "heirs-male of the body," as to the heirs-male of the Drummonds and Flemings, whatever they mean as to the heirs-male of the Ladies not marrying Drummonds or Flemings; and therefore "heirs-male" *may* mean "heirs-male of the body."

My Lords, Is it probable that the author of this instrument, considering what he intended respecting his daughters *respectivè* in one case, and what he meant as to the Drummonds and Flemings *respectivè* in another, is it probable that he meant to say, I give this to you and your heirs-male general,—and afterwards to your sister, and her heirs-male general,—and afterwards to a fourth, and her heirs-male general;—and then to say, if you do not marry a person of such a quality, you shall not have the estate; and if you do marry a person of such a quality, and then do some acts which are prohibited, you shall not keep the estate? What is to be the consequence, if, after so marrying, she contravenes or violates any of the conditions? The consequence is, to take away the estate from her and her heirs-male general, for the purpose of giving it in all probability to the same persons from whom it is taken away, the heirs-male general of the author of the instrument. I beg your Lordships attention to this, because we have had it argued, that this is not a case of forfeiture, but that it is a case where a Lady is to capacitate herself, by marrying, to take; and therefore it has been said, that as these Ladies might not, none of them might, capacitate themselves to take, by marrying a gentle-

man of honourable and lawful descent, it is necessary that the heirs-male of the author of the deed should come in as *his* heirs-male under that general destination; because they would not come in under these daughters, as their heirs-male, not capacitating themselves to take. To those who use that argument I answer, it is not only a case of, capacitation to take, but it is a case of forfeiture, too, after they had taken. It is very true, that if none of the Ladies married a Drummond or a Fleming, or a person of honourable and lawful descent, none of their heirs-male could take under this destination; and therefore there might be, in that way, a necessity for the destination to the author's heirs-male generally. But put the case on the other hand, that they did every one marry, one a Drummond, a second a Fleming, and a third another Fleming, and so on. Suppose one of them afterwards sold, or suffered the estate to be subjected to eviction (I say nothing as to altering the order of succession), To whom is the forfeiture? What is to be the effect of it? Is it understood to be the clear meaning of these words, that the forfeiture is to carry over the estate to those very individuals who would have taken it if there was no forfeiture? If that is so to be argued, I do not say that this circumstance is decisive, but surely it is very much to be attended to.

But there is another very weighty circumstance distinguishing this from the Linplum case, which I do not recollect having heard taken notice of in the argument in this case, nor do I find it in my notes. I am afraid, therefore in repeating it, I attribute more weight to it than belongs to it; but having given it the best attention I can, I think there is a great deal of weight belongs to it. In the case of Linplum, the limitation was to Alexander, the second son of Hay of Drummelzier, and his lawful heirs-male. What was the object of the construction that "heirs-male" meant "heirs-male general?" To let in his younger brothers, to let in the younger brother of Hay of Belton, and to let in the younger brother of Hay of Lawfield. But what is to be the effect of this construction here? Your Lordships see, it is to be a construction to exclude, I do not say absolutely to exclude, but almost absolutely to exclude, the younger sisters, until there shall be a failure of these heirs-male general of the elder sisters, for whom you look upwards, for whom you look downwards, and on this side and on that side;

and in a family numerous and respectable as those Kers of Cessfurd, you never could look in vain for them, in all human probability, if you looked to all eternity. The principle of construction we are in this country familiar with, which endeavours to include and not to exclude, to make gift effectual, and not to deny it, in all probability, any effect whatever.

Then your Lordships will look too at that part of the instrument in which the forfeiture is created; it is to be on the persons failzieing, and the heirs-male of their bodies. I do not say that that, taken by itself, is a circumstance which would weigh very much, because if the words heirs-male, in the subsequent clause, mean heirs-male generally, they are by other words put under the conditions, and the conditions attach upon the heirs-male generally of those substitutes which attach upon the heirs-male of the bodies of the others; yet it is not without its weight, that the author of this deed, meaning to limit to these Ladies and their heirs-male general, and making them take and hold under conditions, should describe them and their heirs-male general, as persons failzieing, and the heirs-male of their bodies,—if this clause is to be construed as affecting them. Further, I cannot help thinking another clause deserves great attention, though I see it has been treated occasionally as amounting to just nothing. It is that with respect to the other landed property. “And Farder we have sauld and disponit
 “And be thir pntis sellis and disponis to our saidis airis of
 “taillie successors to our said estate living erledom and lordship
 “foresaid and the airis-male lawfullie to be gotten of their bodyes
 “always under the conditions restrictions and provisions above
 “specified qlk are herein halden as exprest (failzeing of airis-
 “male lawfullie gotten or to be gotten of our awin bodie) all
 “and sundrie utheris lands heritages annualrents milns woods
 “fishings patronages tacks and rights of teinds reversions and
 “otheris heritable rights whatsoever pertaining and belonging
 “to us And binds and obliges us and our airis als well maile as
 “of line” (Your Lordships know they might be his heirs-male without being the heirs of the body of those Ladies,) “(failzing of
 “airis-male of our awin bodie as said is) To denude ourselves of
 “the right thereof To and in favors of our saidis airis of taillie
 “successors foresaidis always under the provisions restrictions
 “and conditions above specified in sik form and manner as sall be
 “devysit.”

Now, my Lords, this clause could mean nothing, if the intention of it was not to provide, that the *other* property was to go with that which had been before conveyed. Then what is the obligation he fixes? It is, That those who are bound shall denude themselves, for the benefit of the heirs of tailzie, *and the heirs of their bodies*. I have not seen it any where stated, that it was urged by any body, that the heirs-male of the body of those daughters, provided they take in *seriatim* substitution, as I humbly think they do, would not have taken those other subjects; or if there was no substitution among the daughters, that the heir-male of the body of the eldest daughter would not have taken. I see it asserted on one side, that they would, and not denied on the other. Who are the persons upon whom the obligation is fixed,—the heirs-male generally? To denude in favour of whom? The heirs of tailzie, and the heirs-male of their bodies? They are the “successors as aforesaid.” But then it is said, that the whole weight belonging to this observation may be got rid of by this remark, That the ultimate destination is to “heirs-male whatsoever.” And if you construe this clause about the *other* property to mean heirs-male of the daughters, and consider heirs-male of the daughters to mean heirs-male of their bodies, you must make the same construction with respect to the heirs-male whatsoever, who are the persons mentioned in the last destination. I do not think so; because with respect to a last destination, where a man says it is to go to all his heirs-male whatsoever, your Lordships know, in the first place, that there is a great deal of difference between the effect of the deed, as to those persons who are named last in it, and those who are named in preceding destinations, as to their obligations, their liabilities to forfeiture, their liabilities to the effect and consequences of contravention. A great many important matters might be mentioned, with reference to which, as to them, there is a great distinction. It is a very easy thing to suppose, that the author of a deed, in such a clause as this, might mean, that all the former substitutes should be the persons to whom, and to the heirs of whose bodies, the conveyance should be made; and yet that it should not be made to his heirs-male, the last in the destinations, and the heirs-male of their bodies. The expression indeed might go beyond the meaning; but you are to reflect upon all the other observations which arise out of the words of the clause of destination to the daughters in that untechnically expressed destination to

them, and which do in no way apply to the pure, dry, technical destination failing them, and which aid you in saying, that in this clause he may, and does mean heirs of the bodies of the daughters; and that in the latter destination the phrase in it alone would not authorise you to say he meant heirs of the bodies of his heirs-male whatsoever. Suppose that all the Drummonds and all the Flemings had been dead before the author of the deed (a case he supposes in his deeds), the words heirs of the body then, in this clause, in that case, could have no meaning at all, unless you applied them to the daughters; because if all the Drummonds and all the Flemings had been dead,—if all those had been dead before the author of the deed, to whom, and to the heirs of whose bodies there is an express limitation, the consequence of that would have been, that this clause could not have operated then as a clause applying to the heirs of the body of any person, if heirs-male of the daughters does not mean heirs-male of their bodies. It seems, that it is not a wholesome mode of interpreting this instrument to say, that you will deny to the words “heirs-male of the body,” in this clause relative to the *other* property, a power of giving construction to the words “heirs-male,” as to those persons, the heirs of whose bodies were very probably meant, as appears by all which precedes in the deed, where their heirs are described by the words “heirs-male;” because you suppose, that you must apply them also to the heirs of the bodies of those who are brought into the deed, perhaps with a view to keep out the *ultimus hæres* of the Crown, by reason that the words *may* reach them, when there is nothing in the preceding parts of the deed to point to an intention, that the heirs-male of *their* bodies should be described under the words “heirs-male.”

My Lords, The clause with respect to the provisions for the daughters appears to me also to have some weight. I cannot help stating to your Lordships, that it seems to me to have been the most singular intention in the world, that this person, both with respect to the provisions of these daughters, and with respect to the property in the estate, should be adverting to their marriages, and adverting to the heirs of the marriages, as he does in one place with respect to their provisions, and yet that their heirs-male should not be construed heirs-male of the body in this part of the deed. If he had meant simply, that there should be a limitation to Lady

Jane Ker, or Lady Anna, or Lady Margaret, or Lady Sophia, and their heirs-male general, what necessity was there for all this, about their marrying a person of honourable descent? Why does he allude thus always constantly to the idea of their marriages? Why does he, in every part of this instrument, allude to the circumstances of their marriages? If one of these Ladies had not married a person of lawful and honourable descent, to be sure she could not have taken,—the heirs of her body would not have taken. But if the first marries a person of lawful and honourable descent, and the second marries also a person of honourable and lawful descent, whom I suppose to be a substitute *seriatim*, is it not a most extraordinary thing, that the author of this deed should have required a marriage of like nature in both cases, and yet, with respect to the marriage in the second instance, that the persons named should have no better chance than what depended upon the utter failure of all heirs-male general of the first taker? In the Linplum case, counsel seem to have admitted, that if there had been a substitution *seriatim et nominatim* of Alexander and his younger brothers, “heirs-male” of Alexander must have meant heirs-male of his body. If you think there is here substitution among the daughters, here you can apply this,—the admission seems to have been founded upon what must have been supposed to have been the intention.

My Lords, I do not go through, because you may refer to it in the papers on the table, where you will find it much better expressed, the general reasoning that is to be found upon cases supposed to be probable and improbable on the part of the appellants, and on the part of the respondents. Upon that, your Lordships can inform yourselves better, and more accurately, by reading the cases, than by my detailing the matters to be found in them. But the result of my consideration of this part of the subject is, that I have not been able to satisfy myself, that these words “heirs-male,” occurring, not in a dry destination, but occurring in such a context as this, I mean the context of the clause of destination in the deed 1648, occurring in such a deed, where there is such a clause as to *other* property, occurring in a deed containing all *such*, the expressions and provisions which have been noticed, and the general object and plan of which is such as I have represented this of 1648 to be, I have not been able to satisfy myself,

that these words must, by an inflexible rule of law, receive the largest construction. I cannot persuade myself, that they may not in legal construction receive a more limited interpretation, from all the considerations to which we have been adverting, provided that that interpretation is made upon grounds which satisfy your Lordships, that this is the declaration plain, and the manifest meaning of the author of the deed.

My Lords, It is in that view of the subject it appears to me this case is to be treated. For the reasons I have stated, I do not think that the case of Linplum is an authority that binds us to hold, that the "heirs-male" of the daughters of Hary Lord Ker were called, if we are satisfied that the "heirs-male of their bodies" were intended to be called. On the contrary, I think that the case of Linplum, with reference to the principle upon which the words, "heirs-male" there were held to be "heirs-male" generally, in order that younger brothers might be included, is a case which ought rather to lead us, instead of in effect excluding the younger daughters by construction, to include the younger daughters as beneficially as the language of this deed, and the author's intent, will allow us to include them. And the decision of this House in that case turned upon this, as I take it, that there was not manifestation enough of the intention of the author of the Linplum deed, to contravene the general and obvious meaning of the words "heirs-male;"—that there was not manifestation enough from what appeared in the deed, that the author of the deed did not mean, that the brothers of Alexander of Drummelzier should take,—did not mean that the younger brothers of Hay of Belton and Lawfield should take,—that there was not proof enough of this, from the circumstances, that persons in several instances would be included under the word, "heirs male," to whom the author of the deed had not manifested an intention to give any thing as substitutes,—that the word "descendants" had been used, and from other circumstances and passages from which argument had been deduced. The House saw, that if they did not give the words their obvious meaning, all the younger brothers of Alexander must have been excluded,—the younger brothers of Hay of Belton must have been excluded,—the younger brothers of Hay of Lawfield must have been excluded;—that Lord Robert Ker, if Alexander had died without heirs of his body,—if John of Belton had died without

heirs of his body,—if John of Lawfield had died without heirs of his body, that Lord Robert Ker must have come in before the younger brothers of Alexander of Drummelzier,—must have come in before the younger brother of Hay of Belton,—must have come in before the younger brother of Hay of Lawfield, notwithstanding it was the marked and manifest purpose of the author of the deed, to prefer Alexander of Drummelzier; and it might be his intention, and probably was so, to prefer the younger branches of the Drummelzier family to Hay of Belton,—and to prefer Hay of Belton, and probably the younger branches of the Belton-house, to Hay of Lawfield,—and to prefer all three to Lord Robert Ker. Contrasting the circumstances that would take place in one way of construing the instrument with reference to intention, with the circumstances that would take place in another way of construing the instrument with reference to intention, my apprehension is, that the judgment of your Lordships House in that case amounted to this, and principally to this, that it was a declaration, that it was more consistent with the intention of the author of the Linplum deed, to give the words “heirs male” their obvious construction, which would include individuals whom the House thought were probably the objects of the bounty of the author of the deed, and who must have been excluded on a different interpretation of the settlement, than it could be shewn to be to interpret the words “heirs male” in a more limited sense, because consequences would otherwise follow, which might be represented as difficult to be reconciled with the supposed intention of the author of the deed, in possible, not probable cases and events.

My Lords, Reasoning in the same way, unless I have fallen into a mistake, from which I have not been able to extricate myself, which I have anxiously endeavoured to avoid, by giving as painful an attention to this case as I could give (not more painful than I know it was my duty to give to it), it does appear to me, to be the plain and manifest intention of the author of this deed, when he used these words, “heirs male,” in the clause as to the daughters, to mean “heirs male of the body;” and unless there be some rule of law which says, that the author of a deed shall not tell you by the deed itself, that by “heirs male” he means “heirs male of the body,” some rule of law which says, that if he uses the words “heirs male,” though he tells you he means “heirs male of the

"body," he has bound you to strike out of the instrument, all the explanatory context,—all explanatory provisions,—all the explanatory plan and form of the instrument, as the Lord Ordinary said in the Marquis of Tweeddale's case; unless there be some such rule of law, it does appear to me, that the opinion of the great majority of the Court of Session is the right opinion.

My Lords, The consequence of all this is, that as far as this applies to the action in the competition of brieves, it appears to me, that this clause created a *seriatim* substitution to the four sisters, and the heirs male of their bodies.

It appears to me further, that the conveyances subsequent to the year 1648, and prescription, have not destroyed the title created by the destination in that deed. It appears to me, that Lady Margaret did not renounce that title, which, by the effect of this instrument of 1648, Sir James Innes claims as deriving under her; and it appears to me further, that these persons are heirs of tailzie. This view of the subject, I think, will exhaust the subject of the competition of brieves, as far as the opinion of the individual who has the honour of addressing your Lordships is material.

With respect to the action of reduction, it furnishes a point of much importance in the law of Scotland. It is a point, however, upon which I feel myself very considerably in doubt, whether I ought to express any opinion upon it now in judgment. I have satisfied myself that I ought not now to express a judicial opinion upon it. Your Lordships will suppose I allude to the question of the fetters—to the question, whether there is a prohibition against altering the order of succession? I cannot conceive your Lordships will find yourselves sanctioned by any precedent which the journals of this House would furnish, to place yourselves in this situation, improbable enough to happen, but which is possible to happen, and which, if possible, ought to be contemplated. If it should happen, that the propinquity neither of Sir James Innes Ker nor of General Ker should be proved, you would have standing upon the journals of this House a judgment upon the fetters in this deed, which would be a judgment that would apply to nobody; a judgment that could be used neither for any body nor against any body: and I have not, on the best consideration I have been able to give this subject, been able to satisfy myself, that the moment is yet come, in which your Lordships should give your opinion judicially upon that. If the

propinquity is proved in the brieves, it will then be for your Lordships, having the parties standing before you, to decide that question of fetters, which is a question which does not affect merely the two individuals who are about to establish their propinquity, but affects also, if they do establish it, third persons, whom, should they not establish their propinquity, they are not entitled to contend with.

My Lords, I forgot to mention the claim on the part of Mr. Bellenden Ker, to be heard as a party in the competition of brieves. My opinion upon that is, that he has properly been made a party to that competition of brieves; and if this were the moment in which a judicial opinion should be given upon the other question of fetters, I might have been disposed to say, that I have not found sufficient reason to differ from the Court of Session upon that. But it is not the time, in my opinion, so to do; and I desire to be understood, as meaning to consider again, and reconsider that question. Your Lordships should not preclude yourselves from reconsidering it, when you are sure you will receive the argument from parties who certainly have an interest in contending the point to be argued, who undoubtedly have an interest in having it well decided, and who necessarily have an interest in what may be finally adjudged.

With this view of the case, I have to mention also, that I feel it, after a great deal of consideration of the subject, incumbent upon me, not to leave this House at the close of this second session, without recording, in some form, the opinion which I have adopted upon the parts of the case which I have discussed. However unworthy I may be of that attention, it is very possible that your Lordships may be pleased to pay some attention to the opinion I may have formed upon a subject of this kind. If so, I cannot make it consistent with my sense of duty to your Lordships or the parties competing at the Bar, not to put your Lordships in possession of it. But I hesitate as to going further now, because I am giving the opinion of an individual on a question of mighty interest to the parties at the Bar;—I am giving an opinion upon a question of infinite interest to the titles both to Peerages and lands in the law of Scotland;—I am giving an opinion in a case, where, though I happen upon these points to agree with a great majority of the Court of Session, I am very well aware that individual Judges, entitled to the highest possible respect from such a person as I am,

have held a different opinion, and have not only held a different opinion, but have held such opinion in a degree that has led them to consider and represent my way of viewing this case, as a way of viewing it dangerous to Scotch law. I am further giving it in the absence of a Noble Lord, who, during the whole of the hearing respecting the estates, attended that hearing; with reference to whom I have infinite satisfaction in saying, that he considered it most diligently—that he considered it most attentively—that he considered it most impartially—that he considered it most learnedly; and I do not think I ought to press your Lordships to take a step now, that would preclude that Noble Lord (if, on a farther consideration of the subject, he should think right so to do) from stating to your Lordships his sentiments (whatever they may be) upon the subject. The course, therefore, that I have determined to take is this: I am sorry it may not be so satisfactory to the parties as I wish it should be; but I am bound to take care that I do not inadvertently do wrong to any parties. The object I have in view is, to propose to your Lordships certain findings, in which what I have stated would be embodied; and offering them in the form of motions to your Lordships House, you will easily find a way to take them into future consideration, if it should be found necessary. I have only to state with respect to myself, that if it should happen that a different opinion should be entertained by any body, I shall do that, which, if I continue to live, I know it will be my duty to do; I shall give the utmost attention to any reasons which can be assigned by any of your Lordships for holding a different opinion; but I should feel that I did not act so fairly and candidly as I ought to do, if I did not assure your Lordships, that the motions which I shall submit this day or to-morrow, contain, with respect to myself, my opinions upon these points of law, which I believe I shall not be able to alter. I have repeatedly considered this subject. I have again and again considered the subject. I have considered it under all the anxiety that belongs to the importance of the case; and I am afraid that I must repeat, what I before said to your Lordships, that if I am in an error, it is, with respect to myself, I fear, an invincible error.

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RESOLUTIONS AND ORDERS

OF

THE HOUSE OF LORDS

IN

THE ROXBURGHE CAUSES.

Competition of Brieves.

I.

“ *Die Martis, 20° Junii 1809.*

“ Moved, That according to the just and legal construction of
“ the substitution of the deed 1648, to the eldest dochter of Hary
“ Lord Ker, without division, and their heirs-male, the several
“ daughters of Hary Lord Ker, in their order, and the heirs-male
“ of their respective bodies begotten *seriatim*, were called as heirs
“ of tailzie and provision, to take the estates conveyed by the said
“ deed, in preference to the heir-male general of the eldest, or of
“ any other of the said daughters; and, therefore, that Sir James
“ Norcliffe Innes, so described in the Interlocutors of the Court of
“ Session, in case he shall prove himself to be the heir-male of the
“ body of Lady Margaret Ker, and that there are no heirs-male
“ existing of the bodies of the Ladies Jane and Anna Ker, ac-
“ cording to the usual course of proceeding in services, is to be
“ preferred in the competition of brieves respecting the said
“ estates; and that upon such proof made, the brieves purchased
“ by Brigadier-General Ker ought to be dismissed.

“ Ordered by the Lords Spiritual and Temporal, in Parliament
“ assembled, That the said motion be taken into consideration on
“ the first cause-day in the next session of Parliament.

(Signed) “ GEORGE ROSE, *Cler. Parliament.*”

Reduction.

II.

“ *Die Martis, 20^o Junii 1809.*

“ Moved, That it is premature for this House to determine the
 “ appeals in the action of reduction, complaining of the Interlo-
 “ cutors which find, That the estates of Roxburghe were held by
 “ the late William Duke of Roxburghe under an entail, which con-
 “ tains an effectual prohibition against altering the order of suc-
 “ cession, before the pursuers’ title and propinquity be esta-
 “ blished.

“ Ordered by the Lords Spiritual and Temporal, in Parliament
 “ assembled, That the said motion be taken into consideration on
 “ the first cause-day in the next session of Parliament.

(Signed) “ GEORGE ROSE, *Cler. Parliament.*”

Order for Sir James Innes Ker’s Service to proceed.

III.

“ *Die Mercurii, 21^o Junii 1809.*

“ Ordered by the Lords Spiritual and Temporal, in Parliament
 “ assembled, That the Lords of Council and Session do, notwith-
 “ standing the pendency of the Appeals in this House, respecting
 “ the Roxburghe Estates, if they shall so think fit, direct the
 “ Macers to proceed, according to the Interlocutor dated the 7th,
 “ and signed the 8th July 1807, (the said Interlocutor being under-
 “ stood by this House to mean, that Sir James Norcliffe Innes, so
 “ described in the Interlocutors of the Court of Session, is to be
 “ preferred in the competition of Brieves, if he proves, according
 “ to the usual course of proceedings in services, that he is the
 “ heir-male of the body of Lady Margaret Ker, and that there are
 “ no heirs-male of the bodies of Ladies Jean and Anna Ker
 “ respectively;) but that such proceedings of the Macers, and all
 “ acts, deeds, and proceedings, of whatever nature, to be made,
 “ done, or executed, by any person or persons, or following there-
 “ upon, shall be without prejudice to any person or right, in case,
 “ upon determining the Appeals, or any of them, in any manner
 “ relating to the Roxburghe estates, depending in this House, this

“ House should hereafter adjudge, that the said Sir James Norcliffe Innes ought not to have been so preferred as aforesaid, or shall, upon determining as aforesaid, or upon any application made to this House, make any order, adjudication, or judgment, contrary to, or inconsistent with the effect of such proceedings of the Macers, or such other acts, deeds, or proceedings as aforesaid, or any of them, in any respect; and that all costs, charges, and expences attending, or to be occasioned by the same, or in relation thereto, or in consequence thereof, or of any of them, shall be paid as this House shall direct, and that the consideration thereof shall be reserved.

(Signed) “GEORGE ROSE, *Cler. Parliament.*”

IV.

“ *Die Mercurii, 21^o Junii 1809.*

“ Ordered by the Lords Spiritual and Temporal, in Parliament assembled, That this House proceed generally upon the several Roxburghe Causes, on the first cause-day in the next Session of Parliament.

(Signed) “GEORGE ROSE, *Cler. Parliament.*”

Competition of Brieves.

V.

20^o Junii 1810.

Sir James Norcliffe Innes, Brigadier Walter Ker, and Bellenden Ker, competing, “ Ordered and adjudged by the Lords Spiritual and Temporal, in Parliament assembled, That so much of the Interlocutors of the Lords of Session of 14th February 1806 as contains an instruction to the Macers to find that John Bellenden Ker, Henry Gawler, and John Seton Carr, esquires, had a title to appear and be heard for their interests in their said services; and that so much of the Interlocutor of the Court of Macers of 17th February 1806 as finds in conformity to the said instruction, be affirmed. And it is declared, that according to the just and legal construction of the substitution of the deed 1648 to the eldest dochter of Hary Lord Ker without division, and their heirs-

[H]

“ male, the several daughters of Hary Lord Ker in their order,
 “ and the heirs-male of their respective bodies begotten *seriatim*,
 “ were called as heirs of tailzie and provision to take the estates
 “ conveyed by the said deed, in preference to the heir-male general
 “ of the eldest or of any other of the said daughters. And it is
 “ further ordered, that the said Interlocutors of the Lords of
 “ Session of 6th, signed 10th March 1807, and 7th, signed 8th July
 “ 1807, the latter Interlocutor explaining the former of 6th March,
 “ and being understood by this House to mean that the said Sir
 “ James Innes Ker is to be preferred in the competition of brieves,
 “ if he proves, according to the usual course of proceedings in
 “ services, that he is the heir-male of the body of Lady Margaret
 “ Ker, and that there are no heirs-male of the body of Ladies Jean
 “ and Anna Ker respectively, be affirmed ; and that the Interlocutors
 “ of the Lord Ordinary on the bills of 27th February 1807 be also
 “ affirmed. And it is further ordered, that the said original and
 “ cross appeal be dismissed this House.

(Signed) “ GEORGE ROSE, *Cler. Parliament.*”

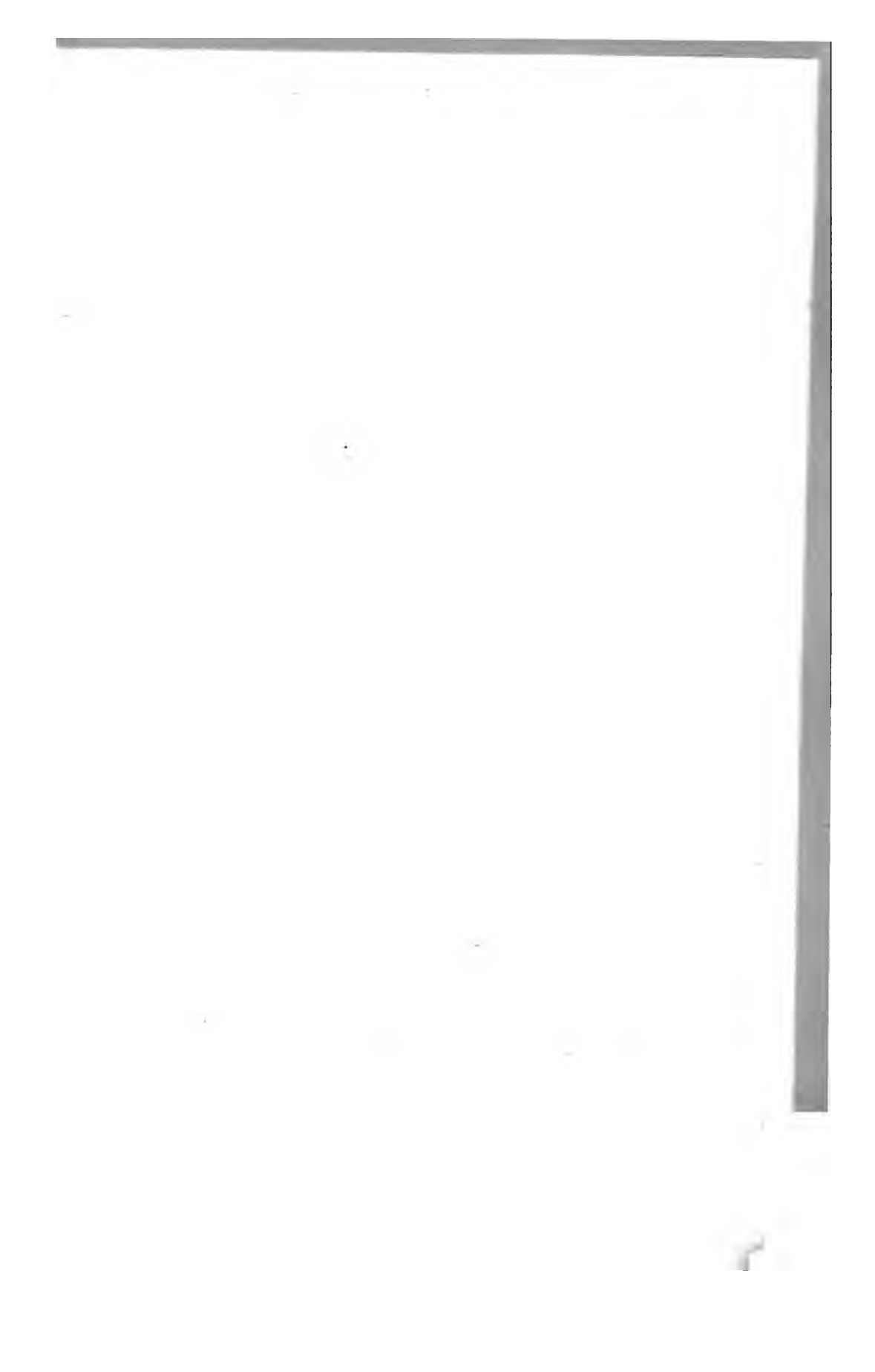
Reduction.

VI.

8^o Junii 1811.

Ordered and adjudged by the Lords Spiritual and Temporal, in
 Parliament assembled, That the appeal be dismissed, and the
 interlocutor complained of affirmed.

(Signed) “ GEORGE ROSE, *Cler. Parliament.*”



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